

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Morton & Gladys Pointon :

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 1975. :

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 28th day of November, 1980, he served the within notice of Decision by certified mail upon Morton & Gladys Pointon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton & Gladys Pointon
Three Rivers Motel, Apt. A
Clay, NY 13041
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
28th day of November, 1980.

Deborah A Bank



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

November 28, 1980

Morton & Gladys Pointon
Three Rivers Motel, Apt. A
Clay, NY 13041

Dear Mr. & Mrs. Pointon:

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	:	
	:	
MORTON POINTON and GLADYS POINTON	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1975.	:	

Petitioners, Morton Pointon and Gladys Pointon, Three Rivers Motel, Apt. A, Clay, New York 13041, 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 1975 (File No. 19950).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on June 12, 1980 at 9:15 A.M. Petitioners, Morton Pointon and Gladys Pointon, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioners were domiciled in and residents of New York State for income tax purposes during 1975.

II. Whether the living expenses in Iran are allowable deductions under section 162(a)(2) of the Internal Revenue Code.

III. Whether the New York State Tax Law is unconstitutional.

FINDINGS OF FACT

1. Petitioners, Morton Pointon and Gladys Pointon, timely filed a New York State Income Tax Resident Return for 1975. They indicated that they lived and worked in Tehran, Iran, for the period of January 1, 1975 to December 2,

1975. On said return they excluded all income earned in Iran.

2. On June 27, 1977, the Audit Division issued a Notice of Deficiency for 1975 against petitioners asserting personal income tax of \$2,936.16, plus interest of \$299.48, for a total due of \$3,235.64. The Notice was issued on the grounds that a U.S. citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country, unless it is clearly shown that he intends to remain there permanently.

On the Statement of Audit Changes which was also issued against the petitioners, the Division stated that a citizen of the United States residing abroad who is domiciled in New York would be considered a resident of New York State for tax purposes, for each year he fails to meet all three of the following conditions:

1. Maintained no permanent place of abode in New York State during the taxable year,
2. Did maintain a permanent place of abode outside New York State for the entire taxable year, and
3. Was in New York State for an aggregate period of not more than 30 days during such year.

Also, the exclusion of income on Federal Form 2555, under bona fide residence, is disallowed as you failed to meet all the requirements. Your bona fide residence in the foreign country or countries must be for an uninterrupted period that includes an entire tax year.

As you do not meet all three of the above conditions, all income is reportable to New York.

3. Petitioners went to Iran in November, 1974 with the express purpose to have petitioner Morton Pointon work there for two to three years so they could save money so as to be able for them to return to Florida to live and

start a business. Petitioner Morton Pointon gave up his position with Naples Central School, Naples, New York, to work for his brother as administrator of the Mary Lou English Training Center, in Tehran, Iran.

4. Petitioners converted their home in Naples, New York, into a two-family dwelling. They rented out one apartment and allowed their married daughter's family to live in the other apartment as caretakers of the property. The petitioners stored most of their furniture and belongings in a barn on the property in Naples, New York. The petitioners leased an apartment in Iran and purchased the furniture and belongings needed there. They then sold them at a loss when they left Iran.

5. During petitioners' 1975 stay in Iran, the petitioners returned to New York from March 26, 1975 to April 16, 1975, of which approximately six of those days were for business purposes.

7. The petitioners contended they should be allowed to deduct on their New York State return the cost of living in Iran (\$15,873.56) as a business expense if they are found to be residents of New York for the entire year of 1975.

8. The petitioners further contended it is unconstitutional for the Audit Division to assume that the petitioners are guilty of something and then to attempt to tax the petitioners for a full year on the technicality of not maintaining a residence outside New York for 28 days in December, 1975.

CONCLUSIONS OF LAW

A. That a United States citizen can change his domicile instantly, for only two elements are necessary. He must take up residence at the new domicile and he must intend to abandon his prior domicile and adopt the new place of residence as his fixed, true and permanent home to which he would have the intention of returning whenever absent (Berhalter v. Irmisch, 75 F.R.D. 539).

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. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home [20 NYCRR 102.2(d)(2)].

That in the instant case the petitioners' intentions prior to and during their period of residency in Iran, to remain there only for a limited time leads to the conclusion that the petitioners were domiciliaries of the State of New York for the entire taxable year 1975.

B. That any person domiciled in New York is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in this State during such year, (2) he maintains a permanent place of abode elsewhere during such entire year, and (3) he spends in the aggregate not more than 30 days of the taxable year in this State [20 NYCRR 102.2(b)].

That petitioners have not satisfied the aforementioned requirements; therefore, they are residents of New York State for tax purposes for the entire taxable year 1975 and subject to tax on income received from all sources.

C. That the employment of petitioner Morton Pointon during 1975 in Iran cannot be characterized as "away from his tax home", within the meaning of section 162(a)(2) of the Internal Revenue Code; therefore, no deduction is allowable for expenses in Iran, since these were personal expenses and as such were nondeductible.

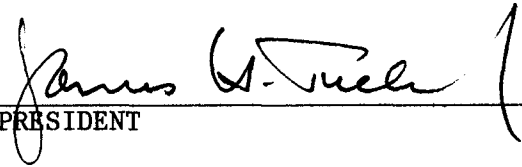
D. That the constitutionality of the laws of the State of New York are presumed by the New York State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional. Therefore, it

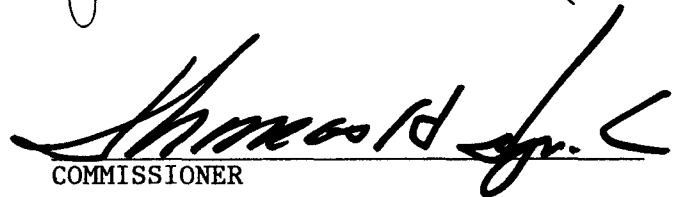
must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of income tax liability on the petitioners.

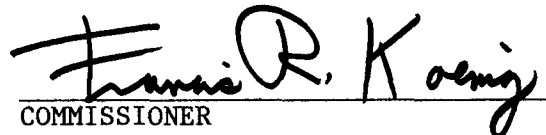
E. That the petition of Morton Pointon and Gladys Pointon is in all respects denied and the Notice of Deficiency issued June 27, 1977 is sustained, along with such additional interest as may be lawfully owing.

DATED: Albany, New York
NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER