

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul Powers :
and Orleen Powers : 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 Years 1971 - 1972. :

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 20th day of February, 1981, he served the within notice of Decision by certified mail upon Paul Powers, and Orleen Powers, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Powers
and Orleen Powers
30 Chapel St.
George Town, Ontario, Canada
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
20th day of February, 1981.

Cornie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Paul Powers :
and Orleen Powers : 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 Years 1971 - 1972. :

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 20th day of February, 1981, he served the within notice of Decision by certified mail upon Carmen J. Caggiano 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. Carmen J. Caggiano
457 Third St.
Niagara Falls, NY 14301

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
20th day of February, 1981.

James A. Hagelund

[Signature]

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

February 20, 1981

Paul Powers
and Orleen Powers
30 Chapel St.
George Town, Ontario, Canada

Dear Mr. & Mrs. Powers:

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
Carmen J. Caggiano
457 Third St.
Niagara Falls, NY 14301
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PAUL POWERS and ORLEEN POWERS	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1971 and	:	
1972.	:	

Petitioners, Paul Powers and Orleen Powers, 30 Chapel Street, George Town, Ontario, Canada, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 11339).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genessee Building, One W. Genessee Street, Buffalo, New York, on April 24, 1980 at 1:15 P.M. Petitioners appeared by Carmen J. Caggeano, PA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioners are entitled to a deduction for travel and away-from-home expenses incurred by petitioner Paul Powers in connection with his employment.

II. Whether petitioners, Paul Powers and Orleen Powers, changed their domicile from the State of New York to Canada in June 1971.

FINDINGS OF FACT

1. Petitioners, Paul Powers and Orleen Powers, filed New York State income tax resident returns for 1971 and 1972, wherein they indicated their residence to be 194 Christiana Street, North Tonawanda, New York 14120.

2. On December 23, 1974, the Income Tax Bureau issued a Statement of Audit Changes wherein it recomputed petitioners' liability on the basis that when an employee is assigned to a post of duty for more than one year, the assignment changes in nature from temporary to indefinite. Travel, meals and lodging expense incurred on an indefinite assignment are not deductible, and any reimbursement or per diem received for such an assignment must be reported as taxable income. Accordingly, a Notice of Deficiency was issued against petitioners on December 23, 1974, asserting additional personal income tax of \$1,068.26, plus interest of \$141.96, for a total due of \$1,210.22 for 1971 and 1972.

3. On February 27, 1975, petitioners filed with the State Tax Commission a petition for redetermination of deficiency of personal income tax for the years 1971 and 1972. The grounds upon which they requested the redetermination was that petitioners felt that the away-from-home expenses claimed on the returns are legitimate.

4. Petitioner Paul Powers was transferred from Arcon Systems Limited, Tonawanda, New York office in June 1971 to work at its Toronto, Canada office as superintendent. The company states that petitioner's transfer to Canada was to be of a permanent nature. Petitioner was thereafter working out of the Toronto office and was required to travel to Peterborough, Kingston and North Bay in Canada. Petitioner was reimbursed for only his meals at the rate of fifty dollars (\$50.00) per week. Petitioner Paul Powers was not reimbursed for the use of his car which he used to travel to the various cities mentioned above.

5. Petitioner Paul Powers is a Canadian citizen who on August 30, 1974 signed an affidavit which stated that he wished to retract any statements he made to the Income Tax Bureau in the past to the effect that he and his family continued to maintain a home in North Tonawanda, New York after June 1971. That his statement was made in error and that petitioners did not maintain a residence in North Tonawanda, New York after June 1971.

The affidavit further stated that petitioner Paul Powers, his wife and two of his children went to live in Canada in June 1971. That petitioners' son Donald moved in with a friend of his and stayed on until he graduated from North Tonawanda High School in June 1972 and at that time he went to Canada to live with petitioners. That petitioners' other son, Paul, Jr., stayed in New York until September 1971 because he worked at Your Host Restaurant during the summer of 1971 and in September 1971 Paul, Jr. went to Canada to go to college.

6. Petitioners filed Federal returns for 1971 and 1972 and used their New York address. That petitioners were audited by the Internal Revenue Service for 1971 and the travel expenses were disallowed. In petitioner Paul Powers' affidavit of August 30, 1974, he states that the only reason that he paid 1971 Federal additional assessment is because his accountant was on vacation when he received the letter from the Internal Revenue Service. That not knowing what to do, petitioner mailed them a check. Petitioner plans to file a claim for refund of this 1971 additional assessment with the Internal Revenue Service.

7. Petitioners did not present any evidence as to the disposition of his home in New York other than the statement they sold the property in October 1974 or evidence in support of their claim of change of domicile other than the affidavit of August 30, 1974.

CONCLUSIONS OF LAW

A. That petitioners have failed to sustain the burden of proof required by section 689(e) of the Tax Law, in establishing by a fair preponderance of all the available evidence, that he was required by his employer to be away from his tax home in the pursuit of a trade or business for a temporary period of time in accordance with section 162(a) of Internal Revenue Code.

B. That petitioners have failed to establish by a preponderance of the evidence that they changed their domicile from New York to Canada in June 1971. Once established, a domicile continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there.

The fact that the instant case lacks substantial evidence in support of a bona fide intention to remain in Canada on a permanent basis during the years at issue, coupled with the conflicting evidence, leads to the inference that petitioners did not change their domicile during the years at issue.

C. 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 failed to show they met aforementioned requirements; therefore, they were residents of New York State for each of the entire taxable years of 1971 and 1972.

D. That the petition of Paul Powers and Orleen Powers is denied and the Notice of Deficiency dated December 23, 1974 is sustained, together with such additional interest which is lawfully owing.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER