

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Susan B. Fisher

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income :
Tax under Article 22 & 30 of the Tax Law for the :
Year 1976.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Susan B. Fissher, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Susan B. Fisher
c/o Gordon David Fissher
624 Oliver Bldg.
Pittsburgh, PA 15222

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
9th day of April, 1982.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Susan B. Fisher :

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for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of NYS & NYC Income
Tax under Article 22 & 30 of the Tax Law for the :
Year 1976.

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Gordon D. Fisher the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gordon D. Fisher
Titus, Marcus & Shapira
624 Oliver Bldg.
Pittsburgh, PA 15222

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
9th day of April, 1982.

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

April 9, 1982

Susan B. Fisher
c/o Gordon David Fisher
624 Oliver Bldg.
Pittsburgh, PA 15222

Dear Ms. Fisher:

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 & 1312 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Gordon D. Fisher
Titus, Marcus & Shapira
624 Oliver Bldg.
Pittsburgh, PA 15222
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SUSAN B. FISHER

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Articles
22 and 30 of the Tax Law for the Year 1976.

DECISION

Petitioner, Susan B. Fisher, c/o Gordon David Fisher, 624 Oliver Building, Pittsburgh, Pennsylvania 15222, filed a petition for redetermination of deficiency or for refund of personal income tax under Articles 22 and 30 of the Tax Law for the year 1976 (File No. 22469).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on September 21, 1981 at 1:15 P.M. Petitioner appeared by Gordon D. Fisher, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq. of counsel).

ISSUES

I. Whether petitioner properly deducted income earned abroad in determining New York taxable income for 1976.

II. Whether petitioner was a resident individual of New York State for personal income tax purposes in 1976.

II. Whether petitioner's capital gain on the lump-sum distribution from a profit sharing and retirement plan is subject to a 20 percent modification to determine New York adjusted gross income.

FINDINGS OF FACT

1. Petitioner, Susan B. Fisher, filed a New York State Income Tax Resident Return for 1976 which included New York City personal income tax. On this return she subtracted \$10,005.52 from Federal adjusted gross income for income earned while residing abroad. Along with said return, petitioner filed Federal form Schedule D (Capital Gains and Losses) indicating a gain of \$883.21 of which 50 percent (\$441.60) was included in taxable income.

2. On October 27, 1977, the Audit Division issued a Statement of Audit Changes against petitioner imposing additional New York State personal income tax for 1976 of \$363.18 and New York City tax of \$59.83. The Division considered petitioner a New York State resident for the entire year (1976) and therefore taxed her total income, regardless of the source. In addition, petitioner's reported capital gain was increased pursuant to the 20 percent capital gain modification. Accordingly, on January 16, 1978, the Audit Division issued a Notice of Deficiency against petitioner for additional personal income taxes of \$423.01, plus interest of \$27.09 for a total of \$450.10.

3. Petitioner was employed by the Ford Foundation in Nairobi, Kenya from January, 1972 through January 30, 1976 when her employment contract expired. At such time, petitioner returned to New York City where she was domiciled and worked prior to her move to Nairobi. In January, 1976 petitioner received \$10,005.52 for services performed while in Nairobi as well as a lump-sum distribution from profit sharing and retirement plans of \$1,520.15 consisting of \$636.94 in ordinary income and \$883.21 of capital gains.

4. For Federal income tax purposes for 1975, petitioner filed form 2555 (Exemption of Income Earned Abroad) on which she excluded the maximum amount from gross income in accordance with section 911 of the Internal Revenue Code.

Petitioner did not exclude her income earned in Nairobi from Federal gross income reported for 1976.

5. Petitioner argued that her income attributable to services performed abroad is excludable from the imposition of New York State income tax since she was a nonresident. Petitioner further argued that lump-sum distributions are not subject to the 20 percent capital gain modification.

CONCLUSIONS OF LAW

A. That section 911 of the Internal Revenue Code provides an exemption with certain limitations, for income earned by a U.S. citizen who is a bona fide resident of a foreign country.

That petitioner did not exclude income earned abroad in determining Federal adjusted gross income for 1976 and failed to establish that she was entitled to such exclusion; therefore, petitioner failed to sustain the burden of proof required by section 689(e) 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. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time [20 NYCRR 102.2(d)(2)].

That a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign county unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in New York who goes abroad because of assignment by his employer or for study, research or recreation, does not lose his New York domicile unless it is clearly shown that he intends to remain abroad permanently and not to return. [20 NYCRR 102.2(d)(3)].

That petitioner did not show that her move from New York to Nairobi was intended to be permanent. Therefore, petitioner did not lose her New York domicile.

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 since petitioner was domiciled in New York prior to her move to Nairobi, Kenya in 1972 and did not satisfy the above three requirements, petitioner was a resident of New York State for 1976 in accordance with section 605(a)(1) of the Tax Law. Accordingly, petitioner is subject to tax on income received from all sources including income earned abroad, to the extent included in Federal adjusted gross income, subject to specific modifications by the New York State Income Tax Law.

D. That petitioner's capital gain on the lump-sum distribution from her profit sharing and retirement plan is subject to the 20 percent modification required by section 612(b)(11) of the Tax Law.

E. That the petition of Susan B. Fisher is denied and the Notice of Deficiency issued January 16, 1978 is sustained.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

James H. Tully
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. [unclear]
COMMISSIONER