

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

John J. Frey
and Barbara G. Frey

:

:

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 :
1977.

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 John J. Frey, and Barbara G. Frey the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Frey
and Barbara G. Frey
181 Ridgcrest Rd.
Briarcliff Manor, NY 10510

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
ALBANY, NEW YORK 12227

April 9, 1982

John J. Frey
and Barbara G. Frey
181 Ridgecrest Rd.
Briarcliff Manor, NY 10510

Dear Mr. & Mrs. Frey:

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

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	:	
JOHN J. FREY and BARBARA G. FREY	:	DECISION
For Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioners, John J. Frey and Barbara G. Frey, 181 Ridgecrest Road, Briarcliff Manor, New York 10510, 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 1977 (File No. 25565).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1981 at 10:45 A.M. Petitioner John J. Frey appeared pro se and for petitioner Barbara G. Frey. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether petitioners effectuated a change of domicile on March 25, 1977 or April 1, 1977.

II. Whether a capital gain on the sale of real property was realized during the nonresident period of 1977.

FINDINGS OF FACT

1. Petitioners, John J. Frey and Barbara G. Frey, timely filed a joint New York State Income Tax Nonresident Return for the period January 1, 1977 to

March 25, 1977 and a joint New York State Income Tax Resident Return for the period March 26, 1977 to December 31, 1977, which resulted in a refund request of \$1,644.00.

2. On February 7, 1979 the Audit Division issued a Notice of Deficiency for \$313.34 plus interest, along with an explanatory Statement of Audit Changes which stated, in part:

"The amount of tax due for the entire year shall not be less than would be payable if the total New York Taxable Income shown by the two returns were included in a single return. Therefore, if New York Taxable Income is reported on both returns, the two amounts of taxable income must be combined for the purposes of computing the tax at the prescribed tax rates."

"The Capital Gains received from the sale of your former residence occurred during your resident period. Therefore, the gain should have been reported on your New York Resident Return."

"Net Long Term Capital Gains are taxed by New York at 60% rather than 50%. Accordingly, 20% of the Capital Gains Deduction should be added to income. The portion of Long Term Capital Gains not subject to New York Personal Income Tax is an Item of Tax Preference and subject to New York Minimum Income Tax."

"To arrive at New York Itemized Deductions, Section 615(c)(4) of the State Tax Law requires that a modification be made for allocable expenses attributable to items of tax preference in excess of the specific deduction."

The overpayment of \$1,644.00 shown on petitioners' return was not granted or paid since the audit changes increased their personal income tax liability sufficiently to result in a net balance due of \$313.34, plus interest.

3. Petitioners, John J. Frey and Barbara G. Frey, were residents of Connecticut, when on January 5, 1977 they purchased a one-family home in New York State. On January 6, 1977, petitioners entered into a sales contract to sell their home in Connecticut.

4. In early March, 1977 petitioners moved some of their household goods to the home in New York State. On March 25, 1977 a professional moving company moved petitioners' larger and heavier household goods, equipment and furniture. On April 1, 1977, the day petitioners attended the closing on the sale of their Connecticut residence, petitioners moved the remainder of their household goods.

5. Petitioners contended that they actually effectuated a change of domicile on April 1, 1977. However, petitioner John J. Frey could not recall whether he and his wife physically stayed at the Connecticut residence, or the New York State residence, immediately prior to the closing on April 1, 1977.

6. On Federal form 2119, Sale or Exchange of Personal Residence, petitioners indicated that they occupied their new (New York State) residence on March 25, 1977. On a schedule (CR-60.1) attached to their tax returns, petitioners indicated that they were New York State residents from March 26, 1977 to December 31, 1977. Petitioners contended that on both aforementioned documents the dates were erroneous.

7. The sales contract for the sale of the Connecticut property was not offered for examination or submitted as evidence. No evidence was submitted indicating whether all the contingencies and conditions of the sales contract for the sale of the Connecticut property were met prior to March 26, 1977 or prior to April 1, 1977.

CONCLUSIONS OF LAW

A. That to change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the

new locality (Matter of Newcomb, 192 N.Y. 238, 250-251, 84 N.E. 950, 954-955). The established facts are clear that petitioners John J. Frey and Barbara G. Frey acquired a new home in New York State and moved in on March 25, 1977 with the intent to abandon their domicile in Connecticut and establish a new domicile in New York.

B. That petitioners John J. Frey and Barbara G. Frey became domiciled, and resident individuals of New York State on March 25, 1977 in accordance with the meaning and intent of section 605(a) of the Tax Law and 20 NYCRR 102.2.

C. That since petitioners changed their status from nonresident to resident on March 25, 1977, they must, regardless of the method of accounting they normally employ, accrue and include all items as if they were filing a Federal return for each period of nonresidency and residency on the accrual basis (20 NYCRR 148.10).

D. That the gain on the sale of real property pursuant to the accrual method of accounting is reportable during the period all the contingencies of the contract of sale were met, which fixed petitioners' right to receive income and the amount thereof was able to be determined with reasonable accuracy in accordance with the meaning and intent of section 451 of the Internal Revenue Code, Treas. Regs. 1.451-1(a), section 654(c) of the Tax Law and 20 NYCRR 148.10 (S. C. Chapin et al. v. Comm., (CA-8) 50-1 USTC ¶9171, 180 F.2d 140).

E. That petitioners John J. Frey and Barbara G. Frey have failed to sustain the burden of proof required by section 689(e) of the Tax Law establishing that the gain on the sale of the Connecticut property was accrued prior to March 25, 1977 (or prior to April 1, 1977). Accordingly, the capital gain on

the sale of real property located in Connecticut is reportable during the resident period of March 25, 1977 to December 31, 1977 within the meaning and intent of section 654(c)(2) of the Tax Law.

F. That the petition of John J. Frey and Barbara G. Frey is denied, and the Notice of Deficiency issued February 7, 1979 is sustained, along with such additional interest as may be lawfully owing.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER