

STATE OF NEW YORK

STATE TAX COMMISSION

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|---|---|----------------------|
| In the Matter of the Petition | : | |
| of | : | |
| John & Robin Roche | : | |
| for Redetermination of a Deficiency or a Revision | : | AFFIDAVIT OF MAILING |
| of a Determination or a Refund of Personal Income | : | |
| Tax under Article 22 of the Tax Law for the Year | : | |
| 1974. | : | |

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 3rd day of December, 1982, he served the within notice of Decision by certified mail upon John & Robin Roche, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John & Robin Roche
1864 Foothills Dr. S.
Golden, CO 80401

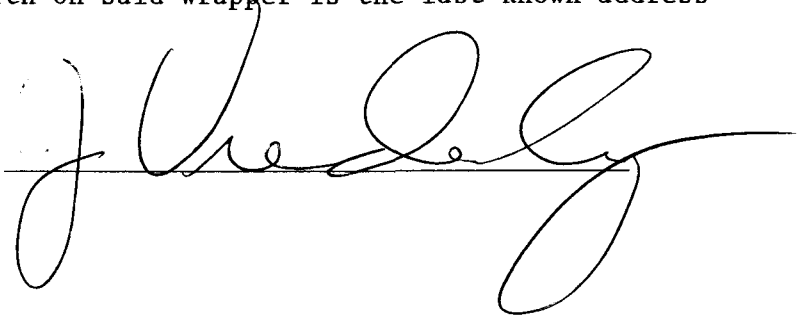
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
3rd day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 3, 1982

John & Robin Roche
1864 Foothills Dr. S.
Golden, CO 80401

Dear Mr. & Mrs. Roche:

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 TAX COMMISSION

1. Petitioners, John and Robin Roche, timely filed their IT-209 New York State Combined Income Tax Return for 1974. Petitioner John Roche was a professional basketball player and petitioner Robin Roche was a housewife. Their address listed on the return was c/o Arthur Morse, 29 South LaSalle Street, Chicago, Illinois.

2. On January 24, 1977, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$7,744.79 for the tax year 1974 on the grounds that petitioners were residents of the State of New York for the full tax year of 1974.

3. The Notice of Deficiency asserted the liability as follows:

| | | |
|-----------------------|-----------------|-------------------|
| <u>DEFICIENCY</u> | <u>INTEREST</u> | <u>TOTAL</u> |
| \$7,744.79 | \$1,005.56 | \$8,750.35 |
| Overpayment on Return | | \$1,091.60 |
| Amount Due | | <u>\$7,658.75</u> |

4. The Statement of Audit Changes stated, in effect, that because petitioners did not reply to the Department of Taxation and Finance "letters of September 19, 1975 and December 15, 1975... [petitioners'] 1974 return has been recomputed as if...[they] were...resident[s] for the entire year". The substance of the letters was an effort to determine petitioners' residence for the year 1974.

5. The aforementioned letters were mailed to petitioners, care of Arthur Morse, suite 803, 29 South LaSalle Street, Chicago, Illinois 60603 (the address petitioners used on their tax return for 1974).

6. In 1974 Mr. Morse was petitioner John Roche's professional basketball representative. Subsequently, Mr. Morse died and the letters were never forwarded to petitioners.

7. From 1971 to on or about January 15, 1974, petitioner John Roche played professional basketball for the New York Nets. During this time he was a resident and a domiciliary of New York, residing in the town of Hempstead. He lived in rented premises as a month to month tenant. He never owned any real property in New York.

8. On or about January 15, 1974, petitioner John Roche was traded by the New York Nets to another professional basketball team, the Kentucky Colonels.

He reported to the Kentucky Colonels within 48 hours from the time he was traded.

9. During the third week of January 1974, petitioner John Roche severed all of his relations with New York. He gave up his premises in Hempstead and became a domiciliary and resident of Kentucky, residing at 8901 Marksfield Road, Louisville, Kentucky. It was his intention to never become a domiciliary or resident of New York again.

10. In June 1974 petitioners were married in the State of Hawaii. They spent a two week honeymoon in New York City and immediately thereafter they returned to their home in Louisville, Kentucky.

11. Petitioner John Roche remained a domiciliary and resident of Kentucky until January 1, 1975. Petitioners were residents of the State of California for the year 1976. Subsequent to 1976 petitioners have been domiciliaries and residents of the State of Colorado. They reside at 1864 Foothills Drive South, Golden, Colorado 80401.

12. Subsequent to his transfer to the Kentucky Colonels, petitioner John Roche played two regular season games in New York. Both games he played as a Kentucky Colonel vs. New York Nets, and on those occasions petitioner stayed at a hotel provided by the Kentucky Colonels for its team members. In addition to the aforementioned regular season games, the Kentucky Colonels played a total of four playoff games in April 1974. Two of these games which petitioner played in were played in New York State.

13. In July 1981 petitioner John Roche took the Colorado Bar Examination.

14. Attached to petitioners' tax return for 1974 was a Form 1099 Misc. from Five-Star Basketball Camp, Inc., Yonkers, New York in the amount of

\$150.00. In addition a wage and tax statement from Long Island Sports Enterprises, Inc. (the Nets) in the amount of \$13,333.34 was attached. Petitioner's only other wage income was from the Kentucky Colonels in the amount of \$73,173.80. Other sources of income reported for 1974 were dividends of \$140.00, interest of \$416.35, sale and exchange of capital assets of \$531.25, state income tax refunds of \$2,355.01 and a partnership loss of \$15,652.73. Petitioner also deducted an adjustment to income of \$5,370.42.

15. No information, other than the above is contained in the record to determine when each class of income was earned.

16. Petitioner was paid on a salary basis per season. No information was submitted with regards to wages paid (if any) for training, pre-season games, exhibition games or playoffs. Petitioner did indicate that most teams reduce the agreed amount of a player's salary by $1/82$ ¹ for each game missed for reasons other than injury or illness.

CONCLUSIONS OF LAW

A. That in general, domicile is the place which an individual intends to be his permanent home, that is, the place to which he intends to return whenever he may be absent. Petitioners ceased to be domiciliaries of New York State in the latter part of January 1974 within the meaning and intent of 20 NYCRR 102.2(d) and established a new domicile in Kentucky.

B. That if an individual changes his status from resident to nonresident he is to file one return as a resident for the portion of the year during which he is a resident and one return as a nonresident for the portion of the year

¹ Generally a professional basketball club plays 82 regular season games per season.

during which he is a nonresident. Said returns are to be completed in accordance with section 654 of the Tax Law and 20 NYCRR 148.

C. That in the absence of facts to the contrary, petitioner's New York income for the period of residence is to include the total wages from the Nets of \$13,333.34, plus miscellaneous income from Five-Star Basketball Camp, Inc. of \$150.00.

D. That section 632(c) of the Tax Law provides in part that the portion of income of a nonresident derived from New York sources shall be determined under regulations of the State Tax Commission. Pursuant to 20 NYCRR 131.16 a nonresident employee who performs services for his employer both within and without the State shall include as income derived from New York sources that portion of his total compensation for services rendered as an employee which the total number of working days employed within the State bears to the total number of working days employed within and without the State. 20 NYCRR 131.21 provides:

"Sections 131.13 through 131.20 are designed to apportion and allocate to this State, in a fair and equitable manner, a nonresident's item of income, gain, loss and deduction attributable to a business trade, profession or occupation carried on partly within and partly without this State. Where the methods provided under those sections do not so allocate and apportion those items under such method as it shall prescribe as long as the prescribed method results in a fair and equitable apportionment and allocation..."

The allocation of income earned by petitioner as a professional basketball player for services rendered as such on the basis of days worked within and without New York State during the year does not result in a fair and equitable allocation of income.

E. That in order to result in a fair and equitable apportionment and allocation, under section 632(c) of the Tax Law and 20 NYCRR 131.21, pre-season, regular season and playoff games must be included in an allocation ratio used

to apportion income based on games played within and without New York State. (Roy H. and Linda White, State Tax Commission, February 14, 1979). The record in this case reveals that in addition to 82 regular season games, the number of exhibition and/or playoff games in which petitioner was required to participate were 4 games, of which 2 games were played in New York State. Accordingly, the Audit Division is directed to compute an allocation ratio for the nonresident period on the basis of fraction, the numerator of which is "4" and the denominator of which is "86".

F. That the Audit Division is directed to recompute the Notice of Deficiency issued January 24, 1977 in accordance with the decision herein and to allocate petitioners' New York deduction and exemption accordingly.

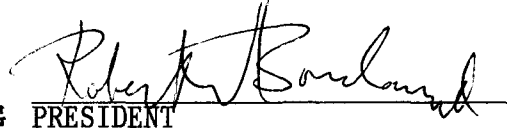
G. That in view of the overpayment credit on said Deficiency, the Audit Division is further directed to authorize any refund which may be due, plus interest, to petitioners.

DATED: Albany, New York

DEC 03 1982

STATE TAX COMMISSION

ACTING PRESIDENT



COMMISSIONER



COMMISSIONER

