

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Arthur M. Schermer (Deceased)	:	
and Marie A. Schermer	:	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	:	
1970 & 1971.	:	

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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Arthur M. Schermer (Deceased) and Marie A. Schermer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

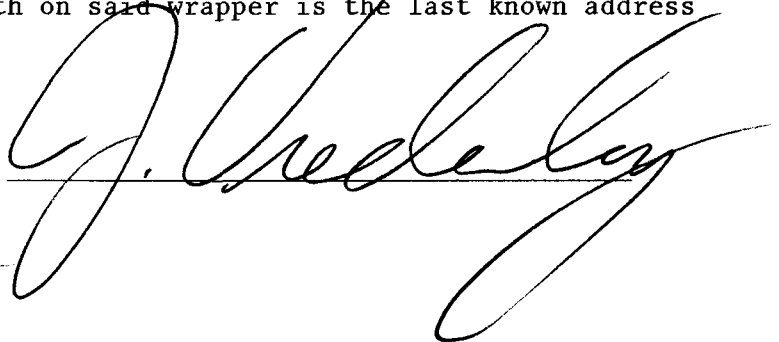
Arthur M. Schermer (Deceased)
and Marie A. Schermer
30 E. Ninth St.
New York, NY 10009

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
14th 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 14, 1982

Arthur M. Schermer (Deceased)
and Marie A. Schermer
30 E. Ninth St.
New York, NY 10009

Dear Mrs. Schermer:

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
ARTHUR M. SCHERMER AND MARIE A. SCHERMER
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1970 and
1971.

DECISION

Petitioners, Arthur M. Schermer (now deceased) and Marie A. Schermer, 30 East Ninth Street, New York, New York 10009, 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 1970 and 1971 (File No. 28629).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 1, 1982 at 2:45 P.M. Petitioner, Marie A. Schermer, appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether petitioners incurred a change of domicile from New York to Brazil in June, 1970.

FINDINGS OF FACT

1. Petitioners, Arthur M. Schermer (now deceased) and Marie A. Schermer, filed part year New York State income tax resident returns for the years 1970 and 1971. On their 1970 return, petitioners indicated their period of New York residence as being from January 1, 1970 to June 15, 1970, and, on the 1971 return, petitioners were shown as residents of New York from July 4, 1971

through the end of the year. From June 16, 1970 to July 3, 1971, petitioners were living and working in Brazil.

2. On their 1970 return petitioners excluded from total New York income the sum of \$6,734.00, said amount representing income earned while living and working in Brazil. For 1971, \$16,780.00 was excluded from the New York return as income earned in Brazil prior to reacquiring status as New York State residents on July 4, 1971. Upon examination of the returns, the Audit Division determined that petitioners had not changed their domicile to Brazil on June 16, 1970 and were therefore taxable as residents of New York for the entire years of 1970 and 1971. Assessments were issued to petitioners for the years 1970 and 1971, whereby all income, regardless of source, was considered taxable.

3. The aforementioned assessments were paid by petitioners, who thereafter filed a claim for refund in the amount of \$2,806.55. On their claim for refund petitioners indicated that the dollar amount of said claim was "unverified". Of the \$2,806.55 claimed refund, \$1,093.75 represented payments made on deficiencies due for other tax years and there was no record of a claimed payment of \$178.26. The remaining balance of the claim for refund of \$1,534.54 (\$2,806.55-\$1,093.75-\$178.26) was filed within the applicable statute of limitations. Petitioners' claim for refund was denied in its entirety via a notice of disallowance dated July 30, 1979. A petition for redetermination of said denial was thereafter filed.

4. Petitioner Arthur M. Schermer was born in New York State, however, he spent a considerable part of his adult working life in Latin America. From approximately 1945 to 1956, Mr. Schermer lived and worked in Venezuela. He returned to New York in 1956 because the company he worked for in Venezuela had been dissolved. From 1957 to 1960, Mr. Schermer was living and working in

Chile. In 1960 he returned to New York State, married Marie A. Schermer in 1961 and began working for an international hotel chain. The employment with the hotel chain, which required Mr. Schermer to travel extensively to Latin America and parts of Europe, lasted to approximately 1965 or 1966. From 1965 or 1966 to 1970, petitioner Arthur Schermer held other jobs which required him to travel to different parts of the world. Petitioners concede that they were continuous residents of New York State from 1960 to June 15, 1970.

5. In 1970, while between jobs, petitioner Arthur M. Schermer accepted employment with the Lummus Company in Brazil. On June 15, 1970 petitioners left New York State for Brazil. Petitioners gave up their duplex apartment in Manhattan, signed their car over to a relative as a gift and put all their furniture in storage, having it crated for later shipment because the duty to Brazil in 1970 was 120% of original cost. Petitioner Marie A. Schermer gave up a career position with the Roosevelt Hospital where she had been employed for more than 10 years.

6. Upon their arrival in Brazil, petitioners signed a two year lease for the rental of a two bedroom, two bathroom unfurnished apartment. Petitioners purchased new furniture, a stove, refrigerator, washing machine, dryer and a new car. Mr. Schermer, already fluent in Spanish, took an immersion course in Portuguese prior to leaving New York and Mrs. Schermer, once in Brazil, enrolled in a course to learn the Portuguese language. Petitioner Arthur M. Schermer applied for and obtained a Brazilian license to operate an amateur radio station.

7. Petitioner Arthur Schermer's employment with the Lummus Company in Brazil was limited by written contract to a maximum of two years. Petitioners entered Brazil on work visas and not immigration visas. Once established in

Brazil, petitioners felt it would be possible to obtain employment of an indefinite nature and immigration visas. At the hearing held herein, Mrs. Schermer testified that her husband would have accepted employment elsewhere in Latin America if something came along.

8. Petitioners left Brazil and returned to New York State on July 4, 1971. Their departure was caused by a difference of opinion between the Lummus Company and the Brazilian government concerning the number of foreigners versus Brazilians working on the project. In deference to the government's position, the Lummus Company reassigned some its non-Brazilian employees to work locations outside of Brazil. Petitioner Arthur M. Schermer was reassigned to a work location in New Jersey where he was employed for approximately one month before being terminated.

9. Upon learning of his impending transfer to New Jersey, petitioner Arthur M. Schermer commenced suit against the Lummus Company through the Brazilian courts for breach of contract. He also sought new employment in Brazil and/or other countries in Latin America. Because of a strict timetable set by the Lummus Company for his departure from Brazil, petitioner Arthur M. Schermer was unable to find new employment.

10. Petitioners, upon their return to New York State, leased an apartment in New York City and Arthur M. Schermer, after the termination of his employment with the Lummus Company, accepted a job in New York City with the Consolidated Edison Company of New York, Inc.

11. While living in Brazil from June 16, 1970 to July 3, 1971, petitioners did not spend any time in New York nor did they own any property having a situs within the State. During this time frame petitioners maintained a checking account in New York so that their attorney could pay the monthly bill for the

storage of their furniture. Petitioners also maintained a checking account in Brazil and paid Brazilian income taxes. While living in Brazil, petitioners retained their status as United States citizens.

CONCLUSIONS OF LAW

A. That in Bodfish v. Gallman, 50 A.D. 2d 457 the Court held that "The evidence to establish the required intention to effect a change in domicile must be clear and convincing [and the] presumption against a foreign domicile is stronger than the general presumption against a change of domicile".

B. That petitioners did not effect a change of domicile from New York to Brazil in 1970 or 1971. The fact that petitioner Arthur M. Schermer's work assignment in Brazil was limited to a maximum of two years and, when added to the fact that petitioners entered Brazil on temporary visas, leads to the conclusion that a change of domicile did not occur. It is also noted that petitioner Arthur M. Schermer consistently returned to New York State after completion of an out of state assignment (Bodfish v. Gallman, supra and Klein v. State Tax Commission, 55 A.D. 2d 982, aff'd 43 N.Y. 2d 812).

C. That the petition of Arthur M. Schermer (now deceased) and Marie A. Schermer is denied and the notice of disallowance dated July 30, 1979 is hereby sustained.

DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER