

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Abraham Leibman	: : : : : :	: : : : : :
		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 1975.		

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Abraham Leibman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham Leibman
400 Kings Point Dr.
Miami Beach, FL 33160

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
6th day of May, 1983.

David Parchuck

Carrie A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Abraham Leibman :
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 :
1975. :

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon William Barnett the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Barnett
Frankel, Hoffman & Co.
225 Broadway
New York, NY 10007

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
6th day of May, 1983.

David Parchuck

James A. DeGallant
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 6, 1983

Abraham Leibman
400 Kings Point Dr.
Miami Beach, FL 33160

Dear Mr. Leibman:

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
William Barnett
Frankel, Hoffman & Co.
225 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ABRAHAM LEIBMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1975.	:	

Petitioner, Abraham Leibman, 400 Kings Point Drive, Miami Beach, Florida 33160, 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 1975 (File No. 25058).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 26, 1981 at 1:15 P.M. Petitioner appeared by Frankel, Hoffman & Company (William Barnett, CPA). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner was a resident of the State of Florida during the year 1975.

II. Whether the Audit Division erred in computing the asserted deficiency due to (a) failure to allocate to petitioner's wife her share of the capital gains and losses and other income; (b) inclusion in petitioner's total New York income of his wife's salary; and (c) failure to evenly divide the personal exemptions between husband and wife.

FINDINGS OF FACT

1. On or about June 17, 1976, Pearl Leibman, petitioner's wife, filed a New York State Income Tax Nonresident Return for the year 1975, showing a home address of 400 Kings Point Drive, Miami Beach, Florida. She reported salary income in the total amount of \$6,900.00 received from the following firms for which she had performed management services: Sovereign Realty Co., Inc., c/o James J. Leibman, 540 Madison Avenue, New York, New York; Granton Building Co., Inc., 2180 Ryer Avenue, Bronx, New York; and Radcliff Estates, Inc., 2415 Jerome Avenue, Bronx, New York.

After briefly consulting with Mr. Barnett (petitioner's representative in this proceeding), Abraham and Pearl Leibman filed an amended New York State Combined (nonresident) Income Tax Return for the same year, on or about July 26, 1976. This return reflected joint federal adjusted gross income of \$125,835.76 and separate New York incomes for Abraham and Pearl of \$8,816.00 and \$6,900.00, respectively. Schedules A (Income and adjustments from federal return), A-1 (Allocation of wage and salary income to New York State), A-2 (Allocation of business income to New York State) and B (Itemized deductions from federal return) were left blank.

2. On November 13, 1978, the Audit Division issued to petitioner, Abraham Leibman, a Notice of Deficiency asserting additional personal income tax due for the year 1975 in the amount of \$22,334.18, plus interest thereon. On May 18, 1978, the Audit Division had issued to Mr. and Mrs. Leibman a Statement of Audit Changes, disallowing their claimed nonresident status for 1975. In addition, the Audit Division increased petitioner's federal adjusted gross income of \$125,835.76 by 20 percent of his federal capital gains deduction to

arrive at a total New York income of \$145,087.90, and calculated New York minimum income tax due from petitioner in the amount of \$3,348.08.

3. In response to the Notice of Deficiency, Abraham and Pearl Leibman timely filed a petition and a perfected petition, maintaining that they were residents of the State of Florida during 1975 and also alleging as follows: (a) that the Audit Division erred in not allocating to Mrs. Leibman her share of the capital gains and losses and other items of income (dividends, interest, etc.); (b) that the Audit Division improperly included Mrs. Leibman's salary in her husband's total New York income; and (c) that the Audit Division failed to evenly divide the four personal exemptions between husband and wife.

4. On or about July 14, 1975, Abraham and Pearl Leibman filed a New York State Combined Income Tax Return for 1974, showing a home address of 39 Westlake Boulevard, Mahopac, New York.

On or about April 11, 1975, the Leibmans' accountant, Ira I. Spritzer, had filed with the Internal Revenue Service an application for an automatic extension of time within which to file their 1974 return, stating as the ground therefor: "Abraham Leibman is a stroke patient. He is required to stay in a warm climate during the winter season. He is now in Florida." On or about June 11, 1975, Mr. Spritzer filed an application for a further extension, stating therein, "Due to Abraham Leibman's illness, his books and records are incomplete and a further extension of time is required." Both applications gave the Mahopac address for the Leibmans.

5. Petitioner did not personally appear at the hearing because of his ill health. From the testimony of his son and his representative, a general chronology of the relevant events emerged, but the exact dates are unknown.

6. For many years, petitioner and his wife had resided in an apartment at 2700 Henry Hudson Parkway, Riverdale, New York. Sometime prior to 1970 (perhaps as early as 1967), Mr. Leibman suffered a stroke and was advised by his physicians to winter in a warm climate. On October 9, 1969, petitioner executed a lease for Apartment Number 402 in Coastal Towers, located at 400 Kings Point Drive, Miami Beach, Florida, for a term of 23 months commencing December 1, 1969. The Leibmans moved most of their furniture to Miami Beach; they gave the remaining furniture to their daughter who continued to reside in the Riverdale apartment for approximately four years following their departure. (She thereafter moved to a smaller apartment in the same building.) On July 14, 1971, petitioner extended his lease on the Coastal Towers apartment for a two-year term, and on May 10, 1973, he further extended the lease for another three years.

7. On February 10, 1967, petitioner executed a will, wherein he recited, "I, Abraham Leibman, resident of the State of Florida, residing in the City of Miami Beach, County of Dade, do make and declare this to be my last will and testament, hereby revoking all former wills and codicils heretofore by me made...".

8. On July 1, 1975, petitioner registered to vote in Dade County, Florida.

9. According to the Schedule K-1 (Partner's Share of Income, Credits, Deductions, etc.) appended to the 1975 federal partnership return of University Properties, petitioner received salary, interest and/or ordinary income of \$2,051.00 and incurred a long-term capital gain of \$868.00 in that year; said schedule shows petitioner's Miami Beach address. According to the Schedules K-1 appended to the 1975 federal partnership return of Sovereign Realty Co., Mr. and Mrs. Leibman each incurred an ordinary loss of \$666.00 in that year. According to Schedule K-1 appended to the 1975 federal partnership return of

Brookdale Realty Co., petitioner received salary, interest and/or ordinary income of \$2,717.00. Said schedules similarly show the Miami Beach address.

10. Various documents introduced in evidence by petitioner's representative showed that: (a) petitioner received his Securities Account Statement with Bache & Co. for the period December 1, 1975 through December 31, 1975 at his Miami Beach address; (b) petitioner and his spouse maintained a checking account at the Sun Bank of Bal Harbour, Florida, at least during January, 1975; (c) petitioner subscribed to telephone service at the Miami Beach apartment at least for the period July 8 through August 8, 1973; (d) on July 12, 1973, Pearl Leibman surrendered the New York license plates for her 1972 Plymouth and on August 1, 1973 received a Motor Vehicle Certificate of Title from the State of Florida for said vehicle; and (e) during 1973 and 1974 petitioner was a member of the Sunny Isles (Florida) Lodge of the B'nai B'rith.

11. Subsequent to a written request made by the Florida Department of Revenue on January 6, 1977, Mr. and Mrs. Leibman jointly filed Intangible Personal Property Tax Returns for 1975, 1976 and 1977, stating on each return that they had moved to Florida in November, 1974.

12. The Westlake Boulevard, Mahopac, New York address was that of a three bedroom summerhouse which the Leibmans have owned for approximately 45 years. Since they first leased their apartment in Miami Beach, their son and daughter spend the summer season at the Mahopac house. And, when the Leibmans visit their family in New York, they stay in Mahopac. The Leibmans have telephone service at the summerhouse listed in their names.

13. Mr. and Mrs. Leibman informed the Audit Division, in reply to its inquiry of January 30, 1978, that they spent approximately 22 days in this state during 1975: 3 days in June, 4 days in July and 15 days in August.

14. In 1975 petitioner received a long-term capital gain in the amount of \$214,654.00, as the result of the liquidation of Sovereign Realty, Inc., a New York corporation.

CONCLUSIONS OF LAW

A. That according to the definitions furnished by section 605 of the Tax Law (as in effect during the year in question), a resident individual is one who is domiciled in New York unless he maintains no permanent place of abode in New York, maintains a permanent place of abode elsewhere and spends not more than 30 days of the taxable year in this state. Section 605(a)(1). If not domiciled in New York, an individual may nonetheless be deemed a resident for tax purposes if he maintains a permanent place of abode in New York and spends more than 183 days of the taxable year in New York (unless in the armed forces during an induction period). Section 605(a)(2).

B. That, leaving aside for the moment the question of petitioner's domicile, he meets all the statutory criteria for qualification as a nonresident of this state during 1975: he maintained a permanent place of abode in the State of Florida; he passed not more than 30 days of the year in New York; and although he maintained a summerhouse in Mahopac, New York, such place of abode, suitable and used only for vacation, is not "permanent" in character. 20 NYCRR 102.2(e).

Furthermore, petitioner's conduct over the 5 to 6 year period preceding the taxable year 1975 demonstrates an evolving intent, fixed before the beginning of 1975, to abandon his New York domicile and to take up a new domicile in Florida. By the end of 1974, his contacts with New York were minimal; by contrast, his permanent home, with the necessary degree of sentiment, feeling

and permanent association with it, had been established in Miami Beach, Florida.

Matter of Bourne, 181 Misc. 238, aff'd. 267 A.D. 876, affd. 293 N.Y. 785.

C. That since petitioner was a nonresident of this state for the entire taxable year 1975, his long-term capital gain of \$214,654.00 was not taxable for New York personal income tax or minimum income tax purposes. Section 632(b)(2).


D. That in view of the foregoing, it is unnecessary to pass upon the second issue raised.

E. That the petition of Abraham Leibman is granted, and the Notice of Deficiency issued on November 13, 1978 is cancelled in its entirety.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER