

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
John E. & Sherrill M. Arnet	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1976.	:	

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon John E. & Sherrill M. Arnet, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John E. & Sherrill M. Arnet
Box 128 RR 1
North Windham, CT 06256

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
2nd day of May, 1984.

David Parchuck

James A. Haggard
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John E. & Sherrill M. Arnet :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Year :
1976. :
_____ :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 2nd day of May, 1984, he served the within notice of Decision by certified mail upon Victor J. Colaio, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Victor J. Colaio
11 Montana St.
Hicksville, NY 11801

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
2nd day of May, 1984.

David Parchuck

James A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 2, 1984

John E. & Sherrill M. Arnet
Box 128 RR 1
North Windham, CT 06256

Dear Mr. & Mrs. Arnet:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Victor J. Colaio
11 Montana St.
Hicksville, NY 11801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN E. ARNET and SHERRILL M. ARNET	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioners, John E. Arnet and Sherrill M. Arnet, Box 128 RR 1, North Windham, Connecticut 06256, 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 1976 (File No. 31357).

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 May 18, 1982 at 10:45 A.M. Petitioners appeared by Victor J. Colaio. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division bears the burden of proof to show that petitioners were domiciled in New York State during the year 1976.

II. Whether petitioner John E. Arnet's employment with the United States Merchant Marine Academy during the year 1976 constituted active service in the armed forces of the United States.

III. Whether petitioners were taxable as residents of New York State during the year 1976.

IV. Whether petitioners, if considered to be taxable as residents of New York for 1976, must include in total New York income a retirement pension received from the United States Air Force.

FINDINGS OF FACT

1. Petitioners herein, John E. Arnet and Sherrill M. Arnet, timely filed a New York State Income Tax Resident Return for the year 1976 reporting total New York income of \$24,018.81. In computing total New York income petitioners subtracted, as an adjustment to income, the sum of \$7,525.60, said amount representing a retirement pension received by petitioner John E. Arnet from the United States Air Force.

2. On April 14, 1980, the Audit Division issued a Notice of Deficiency to petitioners for the year 1976, asserting that additional personal income tax of \$1,448.44 was due together with interest. Said Notice of Deficiency was premised on a Statement of Audit Changes dated November 7, 1979, wherein the Audit Division proposed numerous changes to the computation of petitioners' taxable income for the year 1976. Petitioners do not challenge the majority of the changes proposed by the Audit Division, however, they do assert that they are taxable as nonresident individuals and that, even if determined to be taxable as resident individuals, that the United States Air Force retirement pension is not includable in total New York income.

3. Effective August 11, 1974, petitioner John E. Arnet¹ was appointed Assistant Academic Dean at the United States Merchant Marine Academy in Kings Point, New York. Concurrent with said appointment, petitioner received the

¹ Petitioner Sherrill M. Arnet is involved in this proceeding due to the filing of a joint income tax return with her husband. Accordingly, the use of the term petitioner hereinafter shall refer solely to John E. Arnet.

rank of Commander, United States Maritime Service. Petitioner's initial appointment was for a period not to exceed three (3) years and during the term of said appointment, petitioner was required to wear the Maritime Service Uniform and insignia commensurate with his rank. In 1977 petitioner's appointment was changed from a not to exceed three (3) year appointment to one of an unspecified duration.

4. During the entire year at issue, petitioner worked at the Merchant Marine Academy in Kings Point, New York. Petitioner and his family resided in a single-family house in Kings Point owned by the Kings Point Foundation, an organization set up to provide housing for individuals assigned to the Merchant Marine Academy. Petitioner paid the Foundation a monthly rental fee and was responsible for payment of all utility bills.

5. Petitioner's automobile was registered in New York State and he also had a New York State driver's license. Checking accounts were maintained by petitioner in both New York and Colorado.

6. Prior to joining the Merchant Marine Academy in 1974, petitioner was a career officer with the United States Air Force. Petitioner was born and raised in the State of Michigan and throughout his twenty (20) year military career he maintained the State of Michigan as his home of record and domicile. During this twenty (20) year period, petitioner voted by absentee ballot in Michigan. For the year 1976, petitioner did not vote in New York, but voted by absentee ballot in the State of Michigan.

7. During petitioner's entire career with the United States Air Force, he was not stationed or based within the State of New York. For this reason, petitioner urges that the Air Force retirement pension is not taxable income to New York even if he is held to be taxable as a resident individual.

8. Petitioner's federal adjusted gross income for the year 1976 totaled \$31,530.01, said total consisting of the following items of income and loss:

<u>ITEM</u>	<u>AMOUNT</u>
Wages	\$26,269.20
U.S. Air Force Pension	7,525.60
Interest	510.55
Capital Gain	973.99
Rental and Trust Loss	(4,367.40)
State Income Tax Refund	507.47
Uniform Allowance	125.00
Employee Business Expenses	(14.40)
Total	<u>\$31,350.01</u>

9. By letter dated December 4, 1979, petitioner agreed to a portion of the tax asserted due in the Notice of Deficiency dated April 14, 1980 and also remitted a check in the amount of \$18.37 in payment of said agreed portion.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law places the burden of proof upon a petitioner except in three (3) specifically enumerated instances, none of which pertain to a taxpayer's status as a resident or nonresident. Accordingly, petitioners bear the burden of proof to show that they are taxable as nonresident individuals.

B. That section 605(a) of the Tax Law in relevant part defines a resident individual as one who is domiciled in New York State or one who is not domiciled in the State, but maintains a permanent place of abode in the State and spends more than 183 days during the year in New York unless such individual is in active service in the armed forces of the United States.

C. That section 607(a) of the Tax Law provides that:

"Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required."

D. That section 7701(a)(15) of the Internal Revenue Code defines armed forces of the United States as:

"...all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard."

Since the United States Merchant Marine is under the jurisdiction of the Secretary of Commerce (46 U.S.C.A. §1126), petitioner's employment at the Merchant Marine Academy does not qualify as active service in the armed forces of the United States (Internal Revenue Ruling 70-537).

E. That petitioners have established that they were not domiciled in New York State during 1976. However, the record clearly shows that they spent more than 183 days in New York State during 1976. Therefore, the determination of petitioners' resident status rest on whether petitioners maintained a permanent place of abode in this State during 1976.

F. That a permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. Also, a place of abode, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose [20 NYCRR 102.2(e)].

G. That petitioners' dwelling place during 1976 constituted a permanent place of abode maintained by petitioners. Mr. Arnet's stay in New York State, as a result of his appointment as Assistant Academic Dean, does not constitute a "temporary stay for the accomplishment of a particular purpose" as contemplated by 20 NYCRR 102.2(e), even though such appointment was initially for a three year period. Accordingly, petitioners are taxable as residents of New York State for 1976.


H. That section 612(a) of the Tax Law defines New York adjusted gross income of a resident individual as his federal adjusted gross income subject to certain modifications, none of which, during the year in issue, were applicable to military pension income. Since petitioner John E. Arnet's pension income from the U.S. Air Force was properly included in his federal adjusted gross income for 1976, such income must be included in New York total income for said year (See Matter of Clifford D. Deane, State Tax Comm., April 2, 1982).

I. That the petition of John E. and Sherrill M. Arnet is denied and the Notice of Deficiency dated April 14, 1980 is sustained. Petitioners are entitled to a credit of \$18.37 against said deficiency as noted in Finding of Fact 9, herein.

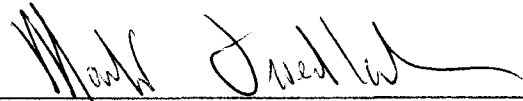
DATED: Albany, New York

STATE TAX COMMISSION

MAY 02 1984


PRESIDENT


COMMISSIONER


COMMISSIONER