

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Jack Robert Braka :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law and Chapter 46, Title T of the Administrative :  
Code of the City of New York for the Year 1977. :  
\_\_\_\_\_ :

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 18th day of January, 1984, he served the within notice of Decision by certified mail upon Jack Robert Braka, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jack Robert Braka  
2 Plaza Court  
Elberon, NJ 07740

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  
18th day of January, 1984.

David Parchuck

Ernie P. DeGrella  
pursuant to Tax Law section 174

Authorized to administer oaths



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

January 18, 1984

Jack Robert Braka  
2 Plaza Court  
Elberon, NJ 07740

Dear Mr. Braka:

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 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, 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: Taxing Bureau's Representative



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JACK ROBERT BRAKA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Year 1977.	:	

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Petitioner, Jack Robert Braka, 2 Plaza Court, Elberon, New Jersey, 07740, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1977 (File No. 28562).

A formal hearing was held before Anthony J. Ciarlone, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983 at 9:30 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether, during 1977, petitioner was domiciled in New York and either maintained a permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York, and was thus a resident individual under Tax Law section 605(a)(1).

FINDINGS OF FACT

1. Petitioner, Jack Robert Braka, timely filed New York State income tax resident and nonresident returns and a Nonresident Earnings Tax Return for the City of New York for 1977. He attached to the returns a CR-60.1, Schedule for



Change of Resident Status, on which he indicated that he was a resident of New York State and New York City from January 1, 1977 to March 7, 1977. Petitioner showed his address on the return as 10 Cliff Road, Winslow, Chesire, England.

2. On November 24, 1978, the Audit Division issued a Statement of Audit Changes to petitioner wherein he was held to be a domiciliary and resident of New York State and New York City. The Statement contained the following explanation:

"Section 102.2(D) (sic) of the New York Personal Income Tax Regulations states that a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain abroad permanently and not return to the United States.

As a domiciliary of New York State, you would be taxed as a resident on all income unless you fulfilled the following three (3) conditions:

1. You did not maintain a permanent place of abode in New York State during the taxable year.
2. You did maintain a permanent place of abode outside New York State during the entire taxable year.
3. You were in New York State for an aggregate period of not more than thirty (30) days during such year.

As all three (3) conditions were not met for 1977, your entire Federal income is subject to New York State tax."

The Audit Division imposed New York State and New York City personal income tax of \$4,130.19 and \$1,204.57 respectively, plus interest. Accordingly, on August 9, 1979 the Audit Division issued a Notice of Deficiency to petitioner imposing additional tax due of \$5,334.76, plus interest of \$596.31 for a balance due of \$5,931.07.

3. Petitioner, Jack Robert Braka, was a domiciliary and resident of New York State and City during 1976. He owned a condominium in New York City which he sold in 1978. In 1976, Mr. Braka had a nervous condition and he



testified that the only thing that did him good was rest and going away from New York.

4. Petitioner alleged that he left New York in the middle of December, 1976. He purportedly stayed at his parents home in New Jersey until March of 1977 when he left the United States to go to England with stopovers in Hong Kong and the Philippines.

5. Mr. Braka was confused in his testimony as to what he did with his furniture in New York. He testified he left the furniture in New York or moved it or someone took care of it. He then remembered seeing some of his furniture in New Jersey in a club but he did not know how it got there.

6. On January 18, 1979 petitioner, Jack Robert Braka, sent a letter to the Audit Division which stated in part:

"Please be informed that I gave up my New York residence as of December 31st, 1976 and did not intend to return to live in New York as evidenced by the fact that I lived outside New York from January 1st, 1977 to March 13th, 1977 in Deal, New Jersey. Since then I am now living in England and if and when I return to the States I intend to live in Deal, New Jersey or Santa Barbara, Calif. I do not maintain a residence in New York City."

7. On October 25, 1979, petitioner, Jack Robert Braka, sent a letter to the Tax Appeals Bureau stating in part:

"On March 7, 1977, I relocated my legal and permanent residence from 605 East 82nd Street, N.Y., N.Y. to 74 Jerome Avenue, Deal, New Jersey. The premises in N.Y. was vacant and for sale from March 7, 1977 to March 21, 1978 at which time it was sold. I definitely established a legal residence in New Jersey prior to my departure for overseas.

I also submit that I was not a resident of New York State under Section 605(a)(1)(B)(i) as I left the United States on March 13, 1977 until 7/4/78, left again 9/8/78 until 1/1/79, left again 2/1/79 and did not return until 9/27/79. I therefore was in a foreign country or countries for at least 450 days within a period of 548 consecutive days."



On his perfected petition, Mr. Braka stated that:

"Please note that my letter of October 25, 1979, was to make the issue easier for the Tax Appeals Bureau and for myself as I believed that the rule stated in my letter was in effect at the time that is in question."

He testified that he did not think about New York residency until he was told he owed New York tax.

8. Petitioner submitted evidence of a New Jersey driver's license issued on August 8, 1977. However, he testified that when he lived in New York, he owned a car which had New Jersey plates and a New Jersey license and which was insured in New Jersey. He also testified that he never had a New York driver's license.

9. Petitioner did not register to vote in New York when he lived in New York. He did have a bank account in New York during 1977. However, he testified that "I have a bank account, but I never use it."

10. Petitioner argued that he was not present in New York State during 1977 and that he would not be subject to New York tax because he was in a foreign country for at least 450 days in accordance with section 605(a)(1)(B) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. [20 NYCRR 102.2(d)(2)].



B. That as a general rule the principal elements of domicile, physical presence in the locality involved and intention to adopt it as a domicile, must concur in order to establish a new domicile. No change of domicile will result if either of these elements is absent. Intention to acquire a domicile without actual residence in the locality does not result in acquisition of a domicile, nor does the fact of physical presence without intention. (25 Am. Jur. 2d, Domicile §17). Evidence must be clear and convincing to establish required intentions to effect a change in domicile. (Matter of Newcomb, 192 N.Y. 238; Matter of Bodfish v. Gallman, 50 A.D. 2d 457).

C. That petitioner, Jack Robert Braka, has failed to establish, by clear and convincing evidence, an intent to change his domicile from New York. Therefore, he is considered to have been domiciled in New York State and City during 1977. He has also failed to sustain his burden of proof to show that he met all three of the following conditions: (1) that he maintained no permanent place of abode in New York during the year; (2) that he maintained a permanent place of abode elsewhere during the entire year; and (3) that he spent in the aggregate not more than 30 days of the taxable year in New York. Therefore, he was taxable as a resident of New York State for 1977 in accordance with section 605(a)(1) of the Tax Law and of New York City for 1977 in accordance with section T46-105.0.(a)(1) of Chapter 46, Title T of the Administrative Code of the City of New York.

D. That section 605(a)(1)(B) of the Tax Law is not applicable to petitioner, since said section is applicable to taxable years commencing after December 31, 1977.



E. That the petition of Jack Robert Braka is denied and the Notice of Deficiency dated August 9, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

  
PRESIDENT

  
COMMISSIONER

   
COMMISSIONER