

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Malcolm Kafka :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of New York State and :
New York City Personal Income Taxes under Articles :
22 & 30 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 18th day of July, 1984, he served the within notice of Decision by certified mail upon Malcolm Kafka, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Malcolm Kafka
130 Beach 121st Street
Belle Harbor, NY 11694

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 July, 1984.

David Parchuck

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

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

July 18, 1984

Malcolm Kafka
130 Beach 121st Street
Belle Harbor, NY 11694

Dear Mr. Kafka:

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, 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

In the Matter of the Petition	:	
of	:	
MALCOLM KAFKA	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Articles 22 and 30	:	
of the Tax Law for the Year 1976.	:	

Petitioner, Malcolm Kafka, 130 Beach 121st Street, Belle Harbor, New York 11694, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Articles 22 and 30 of the Tax Law for the year 1976 (File No. 36193).

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 January 9, 1984 at 1:15 P.M. Petitioner Malcolm Kafka appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether, during the year 1976, petitioner was domiciled in New York State and New York City and either maintained a permanent place of abode in the State and City, maintained no permanent place of abode elsewhere, or spent in the aggregate more than thirty days in the State and City, and was thus a resident individual under section 605(a)(1) of Article 22 and section 1305(a)(1) of Article 30.

FINDINGS OF FACT

1. Petitioner, on October 26, 1979, filed a New York State and New York City resident income tax return for 1976 marked "amended". On said "amended"

return petitioner claimed a credit of \$296.28 for "State Tax Paid With Original¹". A refund of \$28.21 was claimed by petitioner on the amended 1976 return.

2. The Audit Division did not authorize the refund as requested by petitioner on his "amended" return but, in lieu thereof, issued to petitioner a Statement of Audit Changes dated March 30, 1981 proposing additional State and City tax due of \$275.69. The Statement of Audit Changes was issued on the grounds that the Audit Division was unable to find any record of petitioner's original 1976 return and that there was no record of the \$296.28 payment of tax as claimed on his amended return. In accordance with the aforementioned Statement of Audit Changes, the Audit Division, on November 6, 1981, issued a statutory Notice of Deficiency to petitioner for the year 1976, imposing additional tax due of \$275.69, plus interest of \$108.62, for an alleged total due of \$384.31.

3. Effective April 23, 1975, petitioner accepted a full-time permanent position as the chief executive officer of the World War II Veterans' Memorial Hospital in Meriden, Connecticut. On or before April 23, 1975 petitioner moved from an apartment he maintained in Queens, New York to an apartment in Wallingford, Connecticut. Petitioner's spouse was unwilling to relocate to Connecticut with her husband and sometime prior to April 23, 1975 she and two children of the marriage vacated the Queens, New York apartment maintained by petitioner and moved in with her parents. From April, 1975 to the date of the hearing held herein petitioner and his spouse have been continuously separated and living apart.

¹ It is presumed that this statement was intended to mean tax paid on petitioner's original 1976 New York State and City tax return.

4. Due to unforeseen philosophical differences of opinion with the Board of Directors of the World War II Veterans' Memorial Hospital, petitioner was asked for and ultimately gave his resignation effective March 29, 1976. Petitioner continued to live in the Wallingford, Connecticut apartment until June, 1976 while he searched for employment. Sometime in June, 1976 petitioner returned to Queens, New York where he took up residence with a family member while he sought employment. Sometime in September, 1976 petitioner once again moved back to Connecticut where he took up residence with a friend. Petitioner remained in Connecticut until June, 1977 at which time he was able to secure employment in Port Jefferson Station, New York. Petitioner moved to Port Jefferson Station in June, 1977.

5. At the time that petitioner first moved to Connecticut in April, 1975 he leased a fully furnished studio apartment in Wallingford Connecticut on a month-to-month basis. When the New York registration on petitioner's automobile expired in October, 1975, he registered said vehicle with Connecticut. Petitioner obtained a Connecticut drivers license at the time that his New York license expired. Petitioner maintained a checking account with the First New Haven National Bank, New Haven, Connecticut and he did not maintain any bank accounts within the State of New York. Petitioner was active in various civic and charitable organizations in Connecticut.

6. Petitioner was registered to vote in New York and in fact voted in New York during the year at issue. Mr. Kafka also maintained a post office box in Queens, New York during the year 1976. At the hearing held herein petitioner testified that his wife's failure to accompany him to Connecticut "...put the position in jeopardy right from the beginning because it was understood that she was to become an active participant in the social community...".

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d)(2) provides 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. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time..."

B. That the burden of proof is upon petitioner to show that the necessary intention to effect a change in domicile existed [Tax Law, §689(e); §1312(a); 20 NYCRR 102.2(d)(2)]. "The test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (citation omitted). The evidence to establish the required intention to effect a change in domicile must be clear and convincing ..." (Bodfish v. Gallman, 50 A.D.2d 457).

C. That petitioner in this matter has failed to sustain the burden of proof to show that he changed his domicile from New York to Connecticut. Although some facts support that petitioner may have changed his domicile to Connecticut, such as the acceptance of permanent employment in Connecticut, car registration with Connecticut, Connecticut drivers license and bank accounts in Connecticut, we must also note that petitioner voted in New York in 1976, maintained a post office box in New York, rented an apartment in Connecticut on a month-to-month basis and filed an "amended" New York tax return as a resident individual. It can not be found on this record that petitioner has clearly and convincingly demonstrated that he had a bona fide intention of establishing a fixed and permanent home in Connecticut. Accordingly, petitioner was domiciled in the State and City of New York for the year 1976.

D. That sections 605(a)(1) and 1305(a)(1) of the Tax Law, in effect during 1976, both define a resident individual as one who is domiciled in the State or City unless he satisfies all three of the following conditions:

1. maintains no permanent place of abode in the State or City,
2. maintains a permanent place of abode elsewhere, and,
3. spends not more than 30 days in the State or City during the taxable year.

That petitioner resided in New York State and New York City from June of 1976 to September of 1976 and, therefore, he failed to satisfy the conditions set forth in sections 605(a)(1) and 1305(a)(1) of the Tax Law. Accordingly, petitioner is taxable as a resident individual for the year 1976.

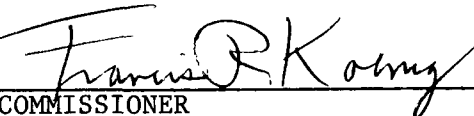
E. That the petition of Malcolm Kafka is denied and the Notice of Deficiency dated November 6, 1981 is sustained, together with such additional interest as may be lawfully due and owing.

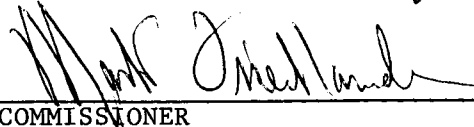
DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER