

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Joseph & Gesua Lofaso	:	
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	:	
1979.	:	

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

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 31st day of July, 1984, he served the within notice of Decision by certified mail upon Joseph & Gesua Lofaso, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph & Gesua Lofaso
310 Walker St.
North Babylon, NY 11704

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
31st day of July, 1984.

David Parchuck

Annina C. Haddock
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Joseph & Gesua Lofaso
310 Walker St.
North Babylon, NY 11704

Dear Mr. & Mrs. Lofaso:

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: Taxing Bureau's Representative

STATE TAX COMMISSION

1. Joseph Lofaso and his wife, Gesua Lofaso, timely filed a joint New York State Income Tax Resident Return for the year 1979 whereon Joseph Lofaso reported only those wages earned in the State of New York.

2. On October 19, 1981, the Audit Division issued a Statement of Audit Changes to petitioners wherein their total income of \$8,412.00, as reported for New York State purposes, was increased by \$12,196.00 based on the following explanation:

"The starting point for computing the New York tax liability is Federal adjusted gross income. Therefore, your tax liability has been recomputed as shown."

The adjustment per said statement was determined as follows:

"Federal adjusted gross income reported	\$20,608.00
Total N.Y. Income reported	8,412.00
Adjustment	<u>\$12,196.00"</u>

3. Subsequently, on November 9, 1981, petitioners filed an amended New York State Income Tax Resident Return for 1979 in conjunction with a Schedule for Change of Resident Status whereon the period of New York State residence was reported as May 29, 1979 to December 31, 1979; however, the number of months in the resident period was reported as "5" and the number of months in the nonresident period was reported as "7". On such amended return petitioners computed a balance due New York State of \$15.34. Such amount was paid by petitioners' check of November 9, 1981.

4. On February 26, 1982, the Audit Division issued a Notice of Deficiency against petitioners based on the computations set forth in the Statement of Audit Changes. Pursuant to such notice, additional personal income tax of \$657.04 was asserted, plus interest of \$122.19, for a total due of \$779.23.

5. Joseph Lofaso (hereinafter petitioner) alleged that he was not a domiciliary and resident of New York State during 1979. He testified that due to marital problems he left New York State on January 3, 1979 with the intent of not returning.

6. When petitioner left New York he went to Colorado where he secured employment as an electrician. He remained in Colorado for approximately four (4) months. While there, he "lived in a trailer in a small town".

7. When petitioner's employment in Colorado terminated he moved to the State of Washington, where he remained for approximately one (1) month. Sometime thereafter, he went back to Colorado and remained there "a couple of more months".

8. During November of 1979 petitioner spent an unspecified period of time in Louisiana.

9. Petitioner testified that he returned to New York for "short periods" during 1979. During such times he stayed at his father's residence. Evidently petitioner worked in New York during the "short periods" he returned since the record shows he earned a total of \$9,783.70 from four (4) separate New York employers during 1979.

10. Petitioner's wife and three children continued to reside at 310 Walker Street, North Babylon, New York during the entire year 1979. Petitioner testified that said address was a private residence owned by his wife's parents.

11. Petitioner reconciled with his wife and moved back to their North Babylon residence in March or April, 1980.

12. Petitioner contended that he paid income taxes to the State of Colorado during 1979; however, no documentation was submitted to support such contention.

13. Petitioner retained his New York driver's license during the year at issue. When questioned as to whether he applied for a Colorado license he replied that he didn't because "I didn't even know if I was going to stay in that state or move on to the next state, which I did".

14. Although petitioner claimed a change of domicile on the basis that he left New York "with intentions of never returning", he failed to indicate to which state he purportedly changed his domicile.

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. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time. 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 to change one's domicile there must be an intent to make the new location a fixed and permanent home, coupled with an actual acquisition of a residence in the new locality. The evidence to establish the requisite intention to effect a change of domicile must be clear and convincing. (Klein v. State Tax Comm., 55 A.D.2d 982, aff'd., 43 N.Y.2d 812; Bodfish v. Gallman, 50 A.D.2d 457).

C. That petitioner was domiciled in the State of New York for the entire year 1979.

D. That section 605(a)(1)(A) of the Tax Law provides that a resident individual means an individual who is domiciled in this state, unless:

"he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state...".

E. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he had satisfied all

the requirements provided for in section 605(a)(1)(A) of the Tax Law. Accordingly, petitioner was a resident individual of the State of New York during the entire year 1979.

F. That petitioner is properly entitled to a credit for the tax of \$15.34 paid with his amended return. (See Finding of Fact "3", supra).


G. That the petition of Joseph Lofaso and Gesua Lofaso is granted to the extent provided in Conclusion of Law "F", supra, and except as so granted, said petition is, in all other respects, denied.

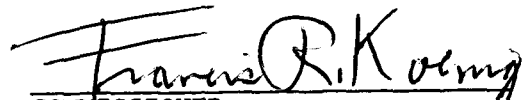
H. That the Audit Division is hereby directed to modify the Notice of Deficiency issued February 26, 1982 to be consistent with the decision rendered herein.

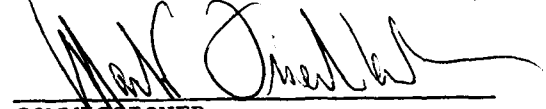
DATED: Albany, New York

JUL 31 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER