

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William & Marjorie MacMillan :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and New York City Nonresidents Earnings Tax :
under Chapter 46, Title U of the Administrative :
Code of the City of New York for the Year 1976. :

AFFIDAVIT OF MAILING

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon William & Marjorie MacMillan, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William & Marjorie MacMillan
c/o Howard J. Schwartz
Robinson, Perlman & Kirschner / 32 E. 57th St.
New York, NY 10022

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
9th day of March, 1984.

David Parchuck

James J. 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
William & Marjorie MacMillan :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and New York City Nonresidents Earnings Tax :
under Chapter 46, Title U of the Administrative
Code of the City of New York for the Year 1976. :

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 9th day of March, 1984, he served the within notice of Decision by certified mail upon Howard J. Schwartz, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Howard J. Schwartz
Robinson, Perlman & Kirschner
32 East 57th St.
New York, NY 10022

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
9th day of March, 1984.

David Parchuck

Annunzio A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 9, 1984

William & Marjorie MacMillan
c/o Howard J. Schwartz
Robinson, Perlman & Kirschner / 32 E. 57th St.
New York, NY 10022

Dear Mr. & Mrs. MacMillan:

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 U 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: Petitioner's Representative
Howard J. Schwartz
Robinson, Perlman & Kirschner
32 East 57th St.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM AND MARJORIE MACMILLAN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and New York City Nonresidents	:	
Earnings Tax under Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Year 1976.	:	

Petitioners, William and Marjorie MacMillan, c/o Howard J. Schwartz, Robinson, Perlman & Kirschner, 32 East 57th Street, New York, New York 10022, 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 nonresidents earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 30025).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 14, 1983 at 9:15 A.M., with all briefs to be submitted by September 6, 1983. Petitioner appeared by Robinson, Perlman & Kirschner, P.C. (Howard J. Schwartz, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether, during the year 1976, petitioners maintained a permanent place of abode in New York and spent in the aggregate more than one hundred eighty-three days in New York, and thus were resident individuals under section 605(a)(2) of the Tax Law.

II. Whether petitioners were subject to the New York City Nonresidents Earnings Tax on wages earned by Mr. MacMillan from work performed in New York City.

FINDINGS OF FACT

1. Petitioners, William and Marjorie MacMillan, timely filed a 1976 New York State Income Tax Nonresident Return (Form IT-203/209).

2. On February 14, 1980, the Audit Division issued a Notice of Deficiency against petitioners in the amount of \$5,796.47, plus interest (accrued to the date of issuance) of \$1,395.60, for a total due of \$7,192.07 for the year 1976. A Statement of Personal Income Tax Audit Changes previously issued on November 23, 1979, indicated that petitioners were being considered residents of New York State for 1976, and also that certain wages earned were subject to tax by New York City, with petitioners' tax liability to New York State and New York City recomputed accordingly.

3. Petitioners were both born in Prince Edward Island, Canada, have always been Canadian citizens and continued to retain Canadian citizenship as of the date of the hearing.

4. Petitioner William MacMillan is a professional hockey player who, in 1976, played for the New York Islanders ("Islanders") hockey team. Mr. MacMillan obtained a visa which allowed him to come to the United States to work. This visa had to be returned to immigration authorities when Mr. MacMillan returned to Prince Edward Island at the end of the hockey season. Mrs. MacMillan and the couple's three children also obtained similar visas to come to the United States during the hockey season.

5. The duration of each National Hockey League ("N.H.L.") season spans portions of two calendar years. In the instant case, involving tax year 1976, portions of both the 1975-1976 and 1976-1977 seasons are involved.

6. The Islanders' 1975-1976 eighty game regular season ended on April 4, 1976. Forty of these regular season games were played between January 1 and April 4, 1976, and twenty-one of these forty games were "away" games not played at the Islanders' Nassau Coliseum home ice. However, two of these twenty-one away games were played in New York City against the New York Rangers, and one of such away games was played against the Buffalo Sabres, thus leaving eighteen regular season games played outside of New York State.

7. The Islanders also qualified for the N.H.L.'s Stanley Cup Playoffs, and were involved in a total of thirteen games during early March and late April of 1976, including seven away games. However, three of these seven away games were played in Buffalo, New York against the Buffalo Sabres, thus leaving a total of four playoff games played outside of New York State. Accordingly, the Islanders and Mr. MacMillan were involved in a total of twenty-two games outside of New York State between January 1 and May 6, 1976.

8. The MacMillans had rented a house during the 1975-1976 season located in North Bellmore, Long Island, from its owners who spent their winters in Florida. Mrs. MacMillan and the children returned to Prince Edward Island at the end of March, 1976, when the owners of the home returned from Florida. Mr. MacMillan lived in the owners' travel trailer (when he was not travelling) for the rest of the season and through the playoffs until the Islanders' elimination on May 6, 1976, after which he immediately returned to Prince Edward Island to join his family.

9. The period January 1 through May 6, 1976 encompassed 127 days.

10. The Islanders and Mr. MacMillan commenced preparations for the 1976-1977 season with a training camp at Farmingdale, Long Island, New York. This camp commenced on September 16, 1976 and the players, including Mr. MacMillan, were housed in a hotel near the training camp site. Prior to the October 7, 1976 opening game of the Islanders' 1976-1977 season, the team played various exhibition games. The number of such games played outside of New York State was not specified, although Mrs. MacMillan testified that at least half of the training camp was spent outside of New York.

11. Mr. MacMillan was assigned to Islander farm clubs located in Rhode Island, and later in Fort Worth, Texas, at the end of the club's training camp, and he played in a total of fourteen games for these clubs before rejoining the Islanders. It was not specified whether any of these fourteen games were played in New York State.

12. Of the Islanders' forty regular season games played between October 7 and December 31, 1976, seventeen games were away games. However, one of these seventeen games was played against the New York Rangers and one of these games was played against the Buffalo Sabres, thus leaving a total of fifteen regular season games played outside of New York State during this period.

13. Mrs. MacMillan testified that she and the children left Prince Edward Island in 1976 to join Mr. MacMillan in Long Island at the beginning of November, 1976, after Mr. MacMillan found out he was leaving the farm team to rejoin the Islanders. Mrs. MacMillan and the children remained in New York throughout November and December of 1976 at a rented house in Roslyn, Long Island, New York.¹

¹ The MacMillans returned, as usual, to Prince Edward Island at the end of the 1976-1977 season.

14. The period September 16 through December 21, 1976 encompassed 107 days.

15. Mrs. MacMillan and the children were in New York for the months of January, February, March, November and December of 1976.

16. Petitioners opened and used one checking account only for daily expenses while in New York, but maintained all other banking accounts in Canada. Petitioners' home in Prince Edward Island during 1976 was a 115-acre farm, purchased in 1971 and located in the village of South Port. Petitioners had Canadian drivers' licenses and never obtained New York drivers' licenses, voted in Canada but never voted in New York, made their wills in Canada, never applied for or received United States citizenship, never owned any real property in New York State, filed both United States and Canadian Individual Income Tax Returns in 1976 and considered their permanent residence and domicile to be their home in Prince Edward Island.

17. Mrs. MacMillan testified that Mr. MacMillan was away from home for an average of $2\frac{1}{2}$ days for each of the out-of-state games he played. This was assertedly due, in part, to N.H.L. rules which required team members to be at the game site twenty four hours before a game's scheduled starting time and, in part, to normal travelling time between game sites in different states and Canadian provinces.

18. The Islanders played four out-of-state games in October, 1976, eight such games in November, 1976 and three such games in December, 1976.

19. Petitioners assert they were not New York State domiciliaries during 1976 (or at any time), that Mr. MacMillan's employment status and location were entirely within the control of the Islanders, that petitioners did not maintain a permanent place of abode in New York in 1976 (or at any other time) and,

further, that neither Mr. MacMillan nor Mrs. MacMillan individually were physically present in New York State for 183 or more days in 1976.

20. The Audit Division, by contrast, concedes that petitioners were not New York domiciliaries in 1976, but asserts that petitioners were present in New York for at least 183 days during 1976 and maintained a permanent place of abode in New York in 1976, and thus were statutory residents of New York pursuant to section 605(a)(2) of the Tax Law and taxable as such.

21. The allocation schedule by which Mr. MacMillan's income was allocated within and without New York State on petitioners' 1976 nonresident tax return reflected 42 games played in New York State and 38 games played out of New York State.

CONCLUSIONS OF LAW

A. That sections 605(a)(2) of the Tax Law and U46-1.0(h)(2) of the New York City Administrative Code define a resident individual, in pertinent part, as one who is not domiciled in New York State and New York City, but who maintains a permanent place of abode in the state and city and who spends in the aggregate more than one hundred eighty-three days of the taxable year in the state and city.

B. That regulations of the State Tax Commission in effect during the year at issue in pertinent part provide:

"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, whether in this State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to his employer's New York office for a fixed and limited period, after which he is to return to his permanent location. If such an individual takes an apartment in New York during this period, he will not be deemed a resident, even though he spends more than 183 days of the taxable year in New York because his place of abode here is not permanent...

However, if his assignment to his employer's New York office is not for a fixed or limited period, his New York apartment will be deemed a permanent place of abode and he will be a resident for tax purposes if he spends more than 183 days of the year in New York [20 NYCRR 102.2(e)]

C. That petitioners were in New York State for the duration of the hockey season after which they returned to Canada. Since petitioners place of abode in New York State was maintained only during a temporary stay for the accomplishment of a particular purpose, said place of abode is not deemed permanent in accordance with 20 NYCRR 102.2(e). Accordingly, petitioners were not residents of New York State during 1976.

D. That the allocation percentage reflected on petitioners' New York State income tax return was not challenged by the Audit Division, it being the Audit Division's position that Mr. MacMillan was a resident and all of his income was taxable to New York State. Thus, since it has been decided that Mr. MacMillan was not a resident, and since the allocation percentage was not challenged, such allocation is accepted as reported.

E. That the Audit Division asserted New York City Nonresidents Earnings Tax as due from the MacMillans on the basis of forty games played in New York City out of seventy-seven games played. However, only three games were played by Mr. MacMillan in New York City (against the New York Rangers at Madison Square Garden) out of the eighty total games played, as reflected on petitioners' allocation schedule per their return. Thus, the Audit Division shall recalculate tax due to New York City based on a fraction, the numerator of which is three and the denominator of which is eighty.

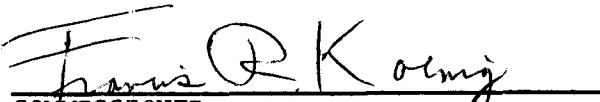
F. That the petition of William and Marjorie MacMillan is granted and the Notice of Deficiency is to be modified in accordance with Conclusion of Law "E".


DATED: Albany, New York

STATE TAX COMMISSION

MAR 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER