

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Paul E. Sherman	:	
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	:	
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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Paul E. Sherman, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul E. Sherman
64 Queens Drive
Schenectady, NY 12304

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
25th day of May, 1984.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul E. Sherman :
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 :
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 25th day of May, 1984, he served the within notice of Decision by certified mail upon John J. Chopack, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John J. Chopack
Peat, Marwick, Mitchell & Co.
111 Washington Avenue
Albany, NY 12210

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
25th day of May, 1984.



Authorized to administer oaths
pursuant to Tax Law section 174

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

May 25, 1984

Paul E. Sherman
64 Queens Drive
Schenectady, NY 12304

Dear Mr. Sherman:

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
John J. Chopack
Peat, Marwick, Mitchell & Co.
111 Washington Avenue
Albany, NY 12210
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PAUL E. SHERMAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioner, Paul E. Sherman, G4 Queens Drive, Schenectady, New York 12304, 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 1977 (File No. 34790).

A formal hearing was held before Thomas J. English, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on August 3, 1983 at 9:00 A.M., with all briefs to be submitted by November 4, 1983. Petitioner appeared by Peat, Marwick, Mitchell & Co. (John J. Chopack, CPA). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether a portion of petitioner's income, received while he was a resident of New York State, was deferred income accruable to a period that he was a nonresident of the State and accordingly not taxable as income by New York State.

FINDINGS OF FACT

1. Petitioner, Paul E. Sherman, and his wife filed a combined New York State Income Tax Resident Return for 1977¹. On this return petitioner reported

¹ Petitioner had received an extension of time to file to June 15, 1978. The return was received on June 19, 1978 and since the Audit Division did not claim that it was late it is presumed to have been timely filed.

wage and salary income for Federal purposes of \$122,065.00 and wage and salary income for New York State purposes of \$27,712.00. A schedule attached to the return indicated that the difference, \$94,353.00, represented "wages attributable to services rendered out of the U.S. in prior years and on which foreign taxes were paid." Prior to filing the aforementioned return petitioner submitted a payment of \$150.00 for tax year 1977.

2. On March 30, 1981 the Audit Division issued a Statement of Audit Changes to petitioner in which it increased his income by \$94,353.00 on the ground that a New York resident is taxable on income from both within and without New York State. In accordance with the Statement of Audit Changes, the Audit Division issued a Notice of Deficiency to petitioner on June 8, 1981. The Notice of Deficiency asserted personal income tax of \$14,121.57 plus interest of \$3,755.50.

3. At the hearing the Audit Division's representative pointed out that petitioner failed to claim credit for the \$150.00 paid for 1977 and the Notice of Deficiency failed to give credit for that payment.

4. In 1968, petitioner was transferred to Japan from New York State by his employer. Initially his assignment was thought to be temporary but it subsequently became a permanent assignment. Petitioner sold his home in New York State in September of 1969.

5. Petitioner's job assignment in Japan continued from 1968 until early in 1977, at which time he returned to New York State. While Mr. Sherman was in Japan he was under contract to General Electric Technical Service Company (GETSCO). The contract provided that a portion of petitioner's remuneration was to be deferred. Petitioner maintained that he had a non-forfeitable right to the amount deferred and that the funds were to be paid to him either at such

time that he severed his relationship with his employer or returned to the United States.

6. The contract which petitioner entered into with GETSCO was not offered into evidence, however, a model contract which petitioner's representative stated contained the same provision as petitioner's contract was submitted.

The model contract stated in part that:

"In consideration of and subject to your acceptance of this agreement and your continued stay in an overseas location, your option and performance of the above mentioned assignments, you may receive amounts that may be agreed upon between us, or specified in accordance with GETSCO policies as they are in effect from time to time in the future."

Petitioner and GETSCO agreed to the amounts which would be due to petitioner however it is unclear whether this agreement was written or oral.

7. Petitioner conceded that he was domiciled in New York during the period he worked in Japan; however, he maintained that he was a nonresident of New York during that period because he maintained a permanent place of abode outside New York until January 31, 1977, had no permanent place of abode in New York from September of 1969 until February of 1977 and spent less than 30 days in New York State in each year from 1968 through and including 1976.

8. Mr. Sherman returned to New York State on February 1, 1977. He maintained that the \$94,383.00 at issue was earned while he was a nonresident and accruable to the period of nonresidency although not received by him until he had reestablished his residency in New York.

CONCLUSIONS OF LAW

A. That during the period at issue section 605 of the Tax Law² provided in pertinent part:

² Section 605(a) of the Tax Law was amended by L. 1977, Chs. 225 and 675; L. 1978, Ch. 790, effective December 8, 1978, and applicable to taxable years commencing after December 31, 1977.

"(a) Resident individual. - A resident individual means an individual:

(1) 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, or

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the armed forces of the United States during an induction period.

(b) Nonresident individual. A nonresident individual means an individual who is not a resident."

B. That section 654(c)(2) of the Tax Law provides, in pertinent part, that:

"If an individual changes his status from nonresident to resident, he shall, regardless of his method of accounting, accrue for the portion of the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status... [t]he amounts of such accrued items shall be determined... as if such accrued items were includible or allowable for federal income tax purposes."

C. That under the accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount can be determined with reasonable accuracy. [Treas. Reg. §1.451-1(a)].

D. That assuming, without deciding, that the deferred compensation received by petitioner, Paul E. Sherman, after his return from Japan met the criteria outlined in Conclusion of Law "C", it may not be treated as an accruable item under section 654(c)(2) of the Tax Law. Petitioner was domiciled in New York State during all of 1977 and, since he had a permanent place of abode in


New York for at least a part of said year and spent more than thirty days in New York, he was a resident for the entire year at issue. Section 654(c)(2) may take effect only when there is a change of residence during a tax year and no such change was possible during the year at issue unless a change of domicile also occurred. (Matter of Thomas J. Murtagh and Maurine M. Murtagh, State Tax Commission, June 11, 1982).

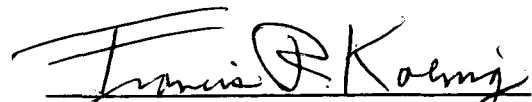
E. The Audit Division is directed to modify the Notice of Deficiency dated June 8, 1981 by allowing credit for the payment of \$150.00 noted in Finding of Fact "1". The Notice of Deficiency as modified is sustained and the petition of Paul E. Sherman is denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984


PRESIDENT


COMMISSIONER


COMMISSIONER