

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip Simon :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State 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. :
_____ :

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 Philip Simon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Simon
188-15C 71 Crescent
Fresh Meadows, NY 11365

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

James R. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 31, 1984

Philip Simon
188-15C 71 Crescent
Fresh Meadows, NY 11365

Dear Mr. Simon:

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

In the Matter of the Petition
of
PHILIP SIMON
for Redetermination of a Deficiency or for
Refund of New York State 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.

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DECISION

Petitioner, Philip Simon, 188-15C 71st Crescent, Fresh Meadows, New York 11365, filed a petition for redetermination of a deficiency or for refund of New York State 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. 33867).

A small claims hearing was held before Allen Caplowaith, 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 appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether, during the year 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) and section T46-105.0(a)(1) of the Administrative Code of the City of New York.

FINDINGS OF FACT

1. Philip Simon (hereinafter petitioner) and his wife, Millicent Simon, timely filed separate New York State income tax resident returns (with New York City personal income tax) on form IT-201/208 for the year 1977. The address used on said return was 188-15C 71st Crescent, Fresh Meadows, New York 11365. There was no direct indication on such return that petitioner was claiming a change of residence during said year; however, he did claim an adjustment to income of \$9,308.00, which represented his salary earned in the State of Florida during the portion of 1977 in which he is purported to have been a resident of said state. Analysis of petitioner's Wage and Tax Statement shows his employer, S & B Management Co., Inc. (d/b/a Beefsteak Charlie's), 230 Park Avenue, New York City, reported his wages for federal purposes as \$25,502.72 and for New York State and City purposes as \$16,195.13. The difference in the amounts reported is \$9,307.59.

2. On December 30, 1980, the Audit Division issued a Statement of Audit Changes to petitioner wherein his New York State and City taxable incomes were increased by \$9,308.00, based on the explanation, "[t]he starting point for computing the New York tax liability is Federal adjusted gross income."

Accordingly, the aforestated adjustment was computed as follows:

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|-------------------------------|--------------------|
| Federal Gross Income reported | \$31,078.00 |
| Total N.Y. Income reported | 21,770.00 |
| Adjustment | <u>\$ 9,308.00</u> |

3. Based on the above, a Notice of Deficiency was issued against petitioner on April 1, 1981 asserting additional New York State personal income tax of \$1,005.39, additional New York City personal income tax of \$304.71, plus interest of \$327.00, for a total due of \$1,637.10.

4. Petitioner alleged that he changed his domicile and residence from New York to the State of Florida during the latter part of July, 1977.

5. Prior to July, 1977, petitioner secured employment as a chef with Beefsteak Charlie's restaurant branch in Levittown, Long Island, New York. Prior to such employment, he had been employed as a chef with a different unrelated restaurant. He contended that he originally sought employment with Beefsteak Charlie's with the hope that he would be granted a transfer to its Florida branch. The record does not disclose the date petitioner commenced his employment with Beefsteak Charlie's.

6. In the latter part of July, 1977, petitioner was granted a transfer to Beefsteak Charlie's branch restaurant in North Miami Beach, Florida.

7. Petitioner remained in Florida until January, 1978, at which time he was re-transferred back to New York. He contended that his transfer to Florida was permanent in nature and his re-transfer back to New York was at the request of his employer and due to unforeseen business circumstances. He submitted a letter from the Executive Vice President of Beefsteak Charlie's, dated March 16, 1981, wherein it was stated that:

"Mr. Phil Simon was transferred from Long Island to Florida on a permanent basis in July, 1977. Due to business reasons and certain circumstances, Mr. Simon was re-transferred back to New York in January, 1978. The Company paid Mr. Simon's relocation expenses in both cases, and as a result of the transfer to Florida, Mr. Simon had to give up his lease and apartment in Queens."

8. Beefsteak Charlie's branch in North Miami Beach, Florida was located in the Ramada Inn motel. Petitioner lived in said motel during his entire stay in Florida.

9. During petitioner's stay in Florida, his wife and son, who was approximately 20 years old at the time, continued to reside in their Fresh Meadows,

New York apartment. Petitioner contended that his wife and son remained in New York due to the illness and death of two of her relatives.

10. Petitioner alleged that the lease on the Fresh Meadows apartment expired the end of February, 1978 and that such lease was not previously renewed since his family had intentions of joining him in Florida upon expiration of the lease. Petitioner is currently residing at the same address in Fresh Meadows.

11. While in Florida, petitioner continued to maintain his New York bank accounts and New York driver's license. His will was not changed to show Florida as the situs of probate.

12. Petitioner did not file a declaration of domicile with the Florida authorities. When questioned as to what steps he had taken to establish domicile in Florida, he responded that he "hadn't planned doing anything until his family came down".

13. During the period petitioner was living in Florida, he spent one day in New York.

14. Petitioner terminated his employment with Beefsteak Charlie's approximately six months after his return to New York.

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; this rule applies even though the individual may have sold or disposed of his former home. 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 and City of New York for the entire year 1977.

D. That section 605(a)(1) of the Tax Law and section T46-105.0(a)(1) of the Administrative Code of the City of New York provide that a resident individual means an individual who is domiciled in the State and/or City of New York, unless he maintains no permanent place of abode in the State and/or City, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in the State and/or City.

E. That petitioner has failed to satisfy the requirements specified under section 605(a)(1) of the Tax Law and section T46-105.0(a)(1) of the Administrative Code of the City of New York. Accordingly, he was a resident individual of the State and City of New York for the entire year 1977.

F. That the petition of Philip Simon is denied and the Notice of Deficiency dated April 1, 1981 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUL 31 1984

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Dineen
COMMISSIONER