

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Emil M. Forte :

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 for the Years 1978 and 1979, 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 1979. :
_____ :

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Emil M. Forte, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emil M. Forte
5235 Post Rd. #6
Bronx, NY 10471

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
6th day of February, 1985.

David Parchuck

James P. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Emil M. Forte
5235 Post Rd. #6
Bronx, NY 10471

Dear Mr. Forte:

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	:	
	:	
EMIL M. FORTE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1978 and 1979, 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 1979.	:	

Petitioner, Emil M. Forte, 5235 Post Road, Apt. #6, Bronx, New York 10471, 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 for the years 1978 and 1979, 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 1979 (File Nos. 36675 and 42234).

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 May 9, 1984 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner was domiciled in, and a resident of, the State of New York during taxable year 1978.

II. Whether petitioner is properly entitled to deductions for excess foreign living expenses incurred while on assignment in Iran during 1978 and 1979.

FINDINGS OF FACT

1. Emil M. Forte (hereinafter petitioner) timely filed a New York State Income Tax Resident Return, short form IT-200, for the year 1978. On such return petitioner reported his address as 177 Hale Avenue, White Plains, New York 10605. For taxable year 1979, petitioner timely filed a New York State Income Tax Resident Return, form IT-201, whereon he reported his address as 5235 Post Road, Bronx, New York 10471. On each of said returns, petitioner failed to report his wage income derived during the period he was assigned by his employer to Iran. For New York City purposes, petitioner filed a Nonresident Earnings Tax Return for 1978. For 1979, he filed as a resident of New York City.

2. On May 27, 1981, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1978 whereon his total New York income reported of \$11,725.00 was increased by \$23,459.00 to conform to his Federal adjusted gross income reported of \$35,184.00. Said adjustment was made based on the explanation that "the starting point for computing the New York tax liability is Federal adjusted gross income". Accordingly, a Notice of Deficiency was issued against petitioner on February 19, 1982 asserting additional New York State personal income tax for the year 1978 of \$2,799.70, plus interest of \$748.98, for a total due of \$3,548.68.

3. On October 18, 1982, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1979 whereon his total New York income reported of \$25,389.00 was increased by \$16,855.00 to conform to his Federal adjusted gross income reported of \$42,244.00. The explanation given for said adjustment was identical to that as stated for taxable year 1978. Additionally, based on Federal audit changes, an adjustment of \$337.00 was made to moving

expenses and dividend income. Accordingly, a Notice of Deficiency was issued against petitioner on January 21, 1983 asserting additional New York State personal income tax for the year 1979 of \$2,399.77, additional New York City personal income tax of \$729.70, plus interest of \$963.19, for a total due of \$4,092.66.

4. During the first half of 1978, petitioner, a resident of New York State, was employed by New York Telephone Company. Effective July 2, 1978, petitioner was transferred to his employer's affiliate, American Bell International, Inc., for assignment in Iran. Such assignment was supposed to be for a period of "two or three years". On completion of the assignment, petitioner was to resume employment with New York Telephone Company.

5. Petitioner entered Iran under a work visa on July 9, 1978. Due to the revolution in Iran, his assignment was prematurely terminated and he returned to the United States on January 28, 1979.

6. Petitioner alleged that he was domiciled in, and a resident of, Iran during the period July 9 through December 31, 1978. He did not claim to be a resident of Iran for 1979.

7. Petitioner notified his employer that on termination of his assignment in Iran he preferred to relocate to either the west coast or Florida.

8. While in Iran, petitioner lived in a furnished apartment provided by his employer.

9. In the alternative, petitioner argued that for New York State purposes, if it is determined that he was a resident of New York during 1978, he is properly entitled to certain deductions from income earned abroad during 1978. Said deductions, as enumerated on Federal form 2555, Exemption of, or Deduction from, Income Earned Abroad, are as follows:

<u>Deduction</u>	<u>Amount</u>
Qualified hardship area deduction	\$2,400.00
Qualified cost-of-living differential	528.00
Qualified housing expenses	3,302.00
Deduction for excess foreign living expenses	<u>\$6,230.00</u>

The aforestated deductions were incorporated into petitioner's 1978 Amended U.S. Individual Income Tax Return, which was timely filed on December 5, 1981. Said amended return showed a Federal refund due petitioner of \$1,985.00, which was subsequently paid by the Internal Revenue Service.

10. Petitioner argued that, in the event that he is deemed to be a resident of New York State during the entire year 1978, in addition to the aforestated excess foreign living expense deduction, he is also properly entitled to have his State liability recomputed using the Maximum Tax rate on personal service income for said year.

11. During the hearing held herein, petitioner made no claim to be a resident of Iran during any part of 1979. However, he did claim entitlement to a deduction for excess foreign living expenses and use of the Maximum Tax rate for computing his New York tax liability for 1979.

12. Petitioner did not file an amended 1979 Federal return. A deduction for excess foreign living expenses was not claimed on his original 1979 Federal return. However, he contended that he is still entitled to such deduction for 1979 for New York State and City purposes.

13. Petitioner did not meet the time requirement provided for under section 913(a)(2) of the Internal Revenue Code for allowance of the deduction for excess foreign living expenses due to presence in a foreign country. However, Public Law 96-608 waived such time requirement with respect to presence in Iran, due to the civil unrest condition existing in that country during the period at issue herein.

14. Petitioner did not contest the adjustment made for 1979 relative to the unreported Federal audit adjustments.

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 [20 NYCRR 102.2(d)(2)].

B. That a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in New York, who goes abroad because of an assignment by his employer or for study, research or recreation, does not lose his New York domicile unless it is clearly shown that he intends to remain abroad permanently and not to return [20 NYCRR 102.2(d)(3)].

The evidence to establish the required intention to effect a change in domicile must be clear and convincing and the presumption against a foreign domicile is stronger than the general presumption against a change of domicile (Matter of Bodfish v. Gallman, 50 A.D.2d 457, 458).

C. That petitioner did not change his domicile to Iran during 1978. Rather, he remained a domiciliary of the State of New York during the entire taxable year 1978.

D. That as in effect during the years at issue, section 605(a) of the Tax Law defined a resident individual as 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 (i) within any period of

five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (ii) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (iii) during any period of less than twelve months, which would be treated as a separate taxable period pursuant to section six hundred fifty-four, and which period is contained within such period of five hundred forty-eight consecutive days, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight...".

E. That petitioner has not met the requirements provided in section 605(a)(1) of the Tax Law. Accordingly, he is deemed a resident individual of New York State for taxable year 1978.

F. That Public Law 96-608 is not applicable in determining whether petitioner was a resident of New York State during the year 1978.

G. That section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income as defined in the laws of the United States for the taxable year, with modifications specified in this section, none of which are applicable herein.

H. That section T46-112.0(a) of the Administrative Code of the City of New York is substantially identical to section 612(a) of the Tax Law in its definition of New York City adjusted gross income.

I. That section 659 of the Tax Law provides, in pertinent part, that:

"Any taxpayer filing an amended federal income tax return... shall also file within ninety days thereafter an amended return under this article...".

J. That section 683(c)(1)(C) of the Tax Law provides, in pertinent part, that the tax may be assessed at any time if the taxpayer fails to comply with section six hundred fifty-nine by not filing an amended return where such amended return was filed for Federal purposes.

K. That since pursuant to section 683(c)(1)(C) of the Tax Law petitioner's 1978 tax may be assessed at any time, the deduction for excess foreign living expenses of \$6,230.00, incorporated into his accepted 1978 Federal amended return, is allowable for New York State tax purposes for said year.

L. That petitioner is properly entitled to have his New York State personal income tax liabilities for 1978 and 1979 computed using the Maximum Tax rate in effect during each of said years within the meaning and intent of section 603-A of the Tax Law.


M. That for taxable year 1979, petitioner is not properly entitled to a deduction for excess foreign living expenses since no such expenses were claimed for Federal purposes.

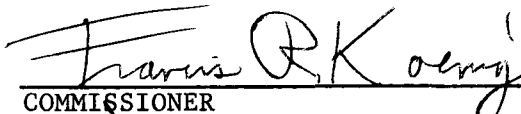
N. That the petition of Emil M. Forte is granted to the extent provided in Conclusions of Law "K" and "L", supra, and except as so granted, said petition is, in all other respects, denied. The two notices of deficiency issued February 19, 1982 and January 21, 1983 are to be modified to be consistent with the decision rendered herein.

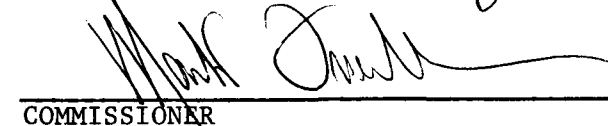
DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER