

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

December 13, 1985

Del T. & Susan J. Volchko
2322 Van Giesen Drive
P.O. Box 310
Meadow Vista, CA 95722

Dear Mr. & Mrs. Volchko:

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 OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DEL T. VOLCHKO AND SUSAN J. VOLCHKO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1978.	:	

Petitioners, Del T. Volchko and Susan J. Volchko, 2322 Van Giesen Drive, P.O. Box 310, Meadow Vista, California 95722, 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 1978 (File No. 36493).

On July 28, 1985, petitioners waived their right to a hearing and requested that a decision be rendered by the State Tax Commission based upon the Department of Taxation and Finance file. Upon review of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioners incurred a change of domicile and resident status from California to New York on June 8, 1978 or on November 22, 1978, or were domiciliaries and residents of New York for the entire 1978 tax year.

FINDINGS OF FACT

1. Petitioners, Del T. Volchko and Susan J. Volchko, did not file a New York State personal income tax return for the year 1978.

2. On July 29, 1981, the Audit Division issued to petitioners a Statement of Audit Changes which stated:

"Since you failed to reply to our previous letter(s), your 1978 personal income tax liability has been computed from information obtained from the Internal Revenue Service under authorization of Federal law (section 6103(d) of the Internal Revenue Code).

Penalty for late filing at 5% per month, maximum 25%. Penalty for late payment at $\frac{1}{2}$ % per month, maximum 25%.

Interest for late payment or underpayment at the applicable rate.

1978
NYS
JOINT

Total income	49068.00	
Itemized/standard deduction	-2400.00	
Balance	46668.00	
Exemptions	-1300.00	
Taxable income	45368.00	
 Tax on above	5065.20	
Personal income tax due	5065.20	
 Total interest	984.93	
 Total due	6050.13	6050.13"

Accordingly, on October 30, 1981, the Audit Division issued to petitioners a Notice of Deficiency for the year 1978 asserting additional tax due of \$5,065.20, plus interest of \$1,139.37, for a total due of \$6,204.57.

3. Prior to the year at issue and from January 1, 1978 until April 15, 1978, petitioners resided in the State of California wherein petitioner Del T. Volchko was employed as a district manager for camera sales for Bell & Howell Company, Chicago, Illinois, and was assigned to the territory encompassing northern California. On April 15, 1978, Bell & Howell Company assigned petitioner Del T. Volchko to "the eastern region of the country," which included the territory east of the Mississippi River, as regional sales manager in charge of catalog accounts. Petitioners purchased a home in Fort Salonga, New York on June 8, 1978, but contend that, from April 15, 1978 until November 22, 1978, they resided with petitioner Del T. Volchko's parents in Fairlawn, Ohio and did

not, therefore, become residents of New York until November 22, 1978 when they moved into their Fort Salonga, New York home. Petitioners resided in New York during 1979 and 1980 and paid New York State income tax for these years.

4. Petitioners maintain that petitioner Del T. Volchko was not assigned to a New York office for Bell & Howell Company and that petitioners could have chosen to reside in one of any number of states making up the territory assigned. Petitioner Del T. Volchko called on accounts in New York during the period from April 15, 1978 through November 22, 1978, but contends that his income did not derive directly from New York sources during this period.

5. Petitioners filed a joint federal income tax return for the year 1978 on which they listed income of \$55,738.00, consisting of petitioner Del T. Volchko's wages from Bell & Howell Company and \$240.00 interest income for a total income of \$55,978.00 and claimed a deduction for moving expenses in the amount of \$6,910.00, resulting in a Federal adjusted gross income of \$49,068.00. Petitioners filed a 1978 California Individual Income Tax Return on which they allocated \$11,628.00 of their total income to California and paid a California income tax of \$55.00. Petitioners also filed a 1978 Ohio Individual Income Tax Return on which they listed their Ohio adjusted gross income as \$37,440.00 which was computed by deducting the \$11,628.00 allocated to California from their Federal adjusted gross income of \$49,068.00 and paid an Ohio income tax of \$978.03.

CONCLUSIONS OF LAW

A. That 20 NYCRR 102.2(d), in effect for the year at issue, provides, in pertinent part:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) 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. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place."

B. That petitioners did not effect a change of domicile from California until June 8, 1978 when they purchased a home in Fort Salonga, New York. Petitioners did not become domiciliaries of Ohio since they had no bona fide intention of making a fixed and permanent home there. However, petitioners' June 8, 1978 purchase of a home in New York wherein they resided through 1980 effected a change of domicile to New York as of said date.

C. That petitioners were not domiciled in or taxable as residents of New York for the period January 1, 1978 through June 7, 1978. Accordingly, petitioners' 1978 New York State personal income tax liability is to be recomputed on the basis that they were nonresidents of the State for the period January 1, 1978 through June 7, 1978. Since petitioners had no income from New York sources during their period of nonresidence, they were not required to file a nonresident return for said period [Tax Law section 654 and 20 NYCRR 148.1(b)].

D. That section 605(a)(1)(A) of the Tax Law, in effect for the year at issue, provides, in pertinent part:

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

(1) who is domiciled in this state, unless

(A) 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..."

E. That 20 NYCRR 102.2(e), in effect for the year at issue, provides:

"(e) Permanent place of abode. 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. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. 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. He will, of course, be taxable as a nonresident on his income from New York sources, including his salary or other compensation for services performed in New York. 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.

In the case of a person domiciled in New York, the maintenance of a permanent place of abode in this State is alone sufficient to make him a resident for tax purposes, even though he remains outside the State for the entire year; the 183-day rule applies only to taxpayers who are not domiciled in New York."


F. That petitioners became domiciliaries of New York on June 8, 1978, maintained a permanent place of abode in New York from June 8, 1978 through December 31, 1978 and were, therefore, taxable as residents pursuant to of section 605(a)(1) of the Tax Law. Petitioners' Federal income must be apportioned for the period of residency in the computation of New York income. In the computation of their New York taxable income for the period of petitioners' residency, their itemized deductions and their allowances for personal exemptions must be apportioned to the resident period. In addition, petitioners are entitled to a credit for income tax paid to the State of Ohio, apportioned to the resident period.

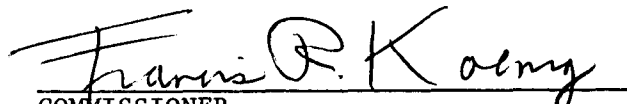
G. That the petition of Del T. Volchko and Susan J. Volchko is granted to the extent indicated in Conclusions of Law "C" and "F", supra; that the Audit Division is directed to recompute petitioners' 1978 New York State personal income tax liability consistent with the decision rendered herein; and that, except as so granted, the petition is in all other respects denied.

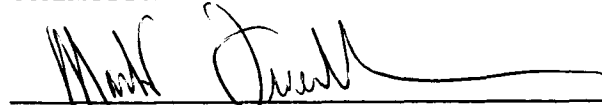
DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER