STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARNOLD A. AND LOTTIE M. ROBBINS		:DETERMINATION
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 1979.	:	

Petitioners, Arnold A. and Lottie M. Robbins, 150-11 Grand Central Parkway, Apartment A, Jamaica, New York 11432, 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 1979 (File No. 805862).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 11, 1990 at 2:45 P.M. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUES

I. Whether petitioner Arnold A. Robbins filed a personal income tax return with New York State in 1979.

II. Whether petitioner Arnold A. Robbins was properly subject to tax as a resident of New York State and New York City during the year 1979.

FINDINGS OF FACT

On June 12, 1987, the Division of Taxation issued to petitioners, Arnold A. and Lottie M. Robbins, a Notice of Deficiency asserting personal income tax due for the year 1979 in the amount of $5,558.32, plus penalty and interest. A Statement of Audit Changes previously

issued to petitioners on June 5, 1986 indicates that the tax assessed consisted of $4,219.92 in New York State tax and $1,338.40 in New York City tax, and that the penalties were imposed pursuant to Tax Law § 685(a)(1), (2) and (c) (failure to timely file a return, failure to timely pay tax due and failure to pay estimated income tax). These documents further reveal the asserted deficiency to be premised upon the position that petitioners were properly taxable as residents of New York State and New York City for the year 1979.

At a Bureau of Conciliation and Mediation Services conference held on February 25, 1988, it was determined that petitioner Lottie M. Robbins had filed a personal income tax return for the year 1979 and paid the applicable tax due thereon. As a result of the conference, the Division of Taxation revised the amount of tax due from petitioner Lottie M. Robbins to zero and the amount of tax due from petitioner Arnold A. Robbins to $1,423.57, consisting of $1,378.76 in New York State tax, $477.81 in New York City tax and a credit of $433.00 for taxes paid to the State of Illinois, plus penalty and interest.[1]

Petitioner began living at his current address in 1947, at which time he was employed by the federal government. In 1951, he left the employ

of the federal government to operate his own business. Sometime in 1956, he returned to work with the federal government, resuming his employment as a civilian with the United States Air Force. From 1956 through 1970, petitioner was assigned to the Air Force base in Rome, New York. In 1970, he was assigned to the Air Force base in Grandview, Missouri and in 1976 was assigned to the Accounting and Finance Office at Scott Air Force Base in Illinois. Petitioner remained employed at this location until 1980, when he retired from federal employment. Petitioner's residence at these various locations consisted of an off-base apartment. During the year at issue, petitioner maintained an off-base apartment in Illinois.

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[1]As the amount assessed to Lottie M. Robbins has been reduced to zero, the term "petitioner", when used in the remainder of this determination, will denote Arnold A. Robbins, except as otherwise indicated.

While employed by the federal government, including the year at issue, petitioner's wife and children resided at the New York City residence. During 1979, petitioner would return to visit his family at least twice a month, usually arriving in New York City on a Friday and departing on Monday. He would also return to the New York City residence on various holidays during the year. At the hearing, petitioner testified that he considered himself a "resident" of New York State and that his children always considered the New York City residence to be where their father lived.

In the years when petitioner was employed at the various Air Force bases away from New York City, including the year at issue, he filed joint United States individual income tax returns with his wife using the New York City address. In 1979, petitioner filed with the Illinois Department of Revenue a nonresident personal income tax return indicating a married filing separately status. Also in 1979, petitioner's wife filed a New York State Income Tax Resident Return, Form IT-201, using the New York City address and indicating a single filing status. The return showed petitioner's income on Schedule A but computed the amount of tax due only on his wife's income. In addition, the return was signed only by his wife.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner alleges that:

(a) his wife's return filed for 1979 is sufficient to constitute the filing of a return by petitioner as it contained information concerning his income and thus triggered the commencement of the three-year statute of limitations; therefore, the Notice of Deficiency was not timely issued by the Division; and

(b) he lived and was employed in Illinois during 1979 and therefore is not subject to tax in New York State during such year.

The Division of Taxation alleges that:

(a) the return filed by petitioner's wife does not constitute the filing of a return by petitioner and therefore the Division may assess petitioner at any time pursuant to Tax Law § 683(c)(1)(A); and

(b) petitioner was a resident of New York State in 1979 and therefore petitioner's income is subject to taxation by New York State pursuant to Tax Law §§ 611 and 612.

CONCLUSIONS OF LAW

A. Tax Law § 653(a) provides that a return required to be filed under Article 22 shall be signed in accordance with regulations prescribed by the Commissioner of Taxation and Finance. Section 147.3 of the Personal Income Tax Regulations provides that a return of a husband and wife must be signed by both spouses. As the 1979 personal income tax return was captioned a single return, listed the taxpayer as petitioner's wife, had the tax due computed only on the wife's income and was signed only by the wife, it must be considered the separate return of petitioner's wife and not a joint return, despite the inclusion of petitioner's income on such return (see, McCord v. Granger, 201 F2d 103, 53-1 USTC ¶ 9134). Therefore, as petitioner did not file a return for 1979, the general three-year statute of limitations provided for by Tax Law § 683(a) does not govern, and the Division's issuance of the Notice of Deficiency is not barred by the statute of limitations (Tax Law § 683[c][1][A]; see Matter of Zapka, Tax Appeals Tribunal, June 22, 1989).

B. Tax Law § 605 (former [a]), in effect for the years at issue, provided, in pertinent part, as follows:[2]

"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...

(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 active service in the armed forces of the United States."

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[2]The personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

C. While there is no definition of "domicile" in the Tax Law (compare, SCPA 1103[15]), the Division's regulations (20 NYCRR 102.2[d]) provide, 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
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> 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.
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> (4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessary conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

Permanent place of abode is defined in the regulations at 20 NYCRR 102.2(e)(1) as:

> "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."

D. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.
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> The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety

> of circumstances which differ as widely as the peculiarities of individuals.... In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect.... Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention, it cannot effect a change of domicile.... There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration.... [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention.... No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. The animus manendi must be actual with no animo revertendi.... This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

E. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713).

The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing."

F. In this case, it is clear that petitioner did not intend to change his domicile from New York to any other place either prior to or during 1979. The evidence indicates that petitioner never intended to give up his old domicile. Petitioner's own testimony indicated that he considered New York City to be his domicile and permanent place of abode, consistent with the fact that his wife and children resided there and supported by his filing of a nonresident return in Illinois. Thus, the requisite intent to change his domicile is clearly lacking in this case.

Furthermore, petitioner did not establish a new domicile in any of the places where he was employed. Petitioner's place of habitation changed with each change of Air Force base assignment, and it cannot be said that petitioner established a new domicile outside of New York prior to or through the year in question. Petitioner's ties to and contacts with New York State were far greater than his ties and contacts to any other state. In addition, petitioner spent more than 30 days in New York State during the year as he returned to his home in New York City at least two weekends each month, for a minimum total of approximately 48 days spent in New York State during 1979. Accordingly, as a New York domiciliary with a permanent place of abode in New York State, and having spent more than 30 days in New York State during the year in issue, petitioner was properly taxable as a resident per Tax Law § 605 (former [a][1]) during the year in question.

G. As a resident individual, petitioner's New York taxable income is his New York adjusted gross income less his New York deduction and exemptions (Tax Law § 611[a]). Petitioner's New York adjusted gross income as a resident individual means his Federal adjusted gross income (Tax Law § 612[a]). Therefore the starting point in computing petitioner's New York State tax liability for 1979 is his Federal adjusted gross income as reported on the joint United States individual income tax return filed by petiitoner and his wife.

H. The petition of Arnold A. and Lottie M. Robbins is denied and the Notice of Deficiency dated June 12, 1987, as modified by the order of the conciliation conferee which cancelled the tax with respect to Lottie M. Robbins and reduced the tax assessed to Arnold A. Robbins (see Finding of Fact "2"), is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE