

MEMORANDUM

TO : Commissioners Gallman and Manley
FROM : Commissioner Koerner
SUBJECT: Isidro and Olga Martin-Montes

This hearing involved claims for refunds for Olga Martin-Montes as follows:

1952 - \$29,357.28
1953 - 30,872.98
1954 - 32,595.48
1955 - 30,969.02

and the claim of Isidro Martin-Montes for \$2506.88 for 1952.

Similar claims for refunds of income taxes for these years were filed with the Federal Government and approved. It was the opinion of our hearing officer that the claims should be allowed in full. The total of these claims was in excess of \$125,000, plus interest.

I discussed this matter with the attorneys for the taxpayers and they have agreed to compromise their claims for the sum of \$75,000, plus interest, to be computed on each year from date tax was paid based upon that portion of the claim that the amount of the settlement bears to the total amount of the claims.

I recommend that this settlement be approved.

M. Koerner

COMMISSIONER

June 13, 1972

Attachment (File)

Approved 6/13/72
Manley
Gallman 6/16/72
Koerner

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
ISIDRO MARTIN-MONTES : DETERMINATION
for Revision or Refund of Personal Income :
Taxes under Article 16 of the Tax Law for :
the Year 1952. :

In the Matter of the Application :
of :
OLGA MARTIN-MONTES : DETERMINATION
for Revision or Refund of Personal Income :
Taxes under Article 16 of the Tax Law for :
the Years 1952 through 1955. :

Each taxpayer having filed applications pursuant to section 374 of the Tax Law for refund of personal income taxes imposed by Article 16 of the Tax Law for 1952 with respect to Isidro Martin-Montes and for 1952 through 1955 with respect to Olga Martin-Montes and such applications having been denied and a hearing thereon having been demanded and duly held before Nigel G. Wright, Hearing Officer, and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

1. The issues herein are (a) whether the taxpayers accomplished a change of domicile from France to New York during the taxable years in question, the taxpayers having changed the position they took on this issue when filing New York State tax returns to now assert that no change of domicile occurred, and whether (b) a refund

is now due when the ordinary limitations period for refunds has already elapsed but when the federal authorities have determined that no change of residence from France to New York had occurred and when the taxpayers have filed a timely report of federal changes under Tax Law section 373(4) based on such determination.

2. The New York refunds claimed for Olga Martin-Montes are in the following amounts: 1952, \$29,357.28, which includes an amount paid on an assessment of September 13, 1955, in the amount of \$182.56 plus \$14.61 penalty and interest; 1953, \$30,872.98, which includes an amount paid on an assessment of September 13, 1955, in the amount of \$155.81 plus \$12.47 penalty and interest; 1954, \$32,595.48; 1955, \$30,969.02, which unaccountably is \$35.00 less than the amount shown on the return for that year. The refund claimed for Isidro Martin-Montes is \$2,506.88 for 1952.

3. Mrs. Olga Martin-Montes was born in England. She married a United States citizen, Frank J. Mackey, in 1920, and thereby gained United States citizenship. After Mr. Mackey's death in 1927 she married Antonio de Portago, a Spanish noble, and in 1928 moved to Biarritz, France, where she acquired a residence - the Villa Le Pelican. Thereafter her second husband died and in 1943 she married Isidro Martin-Montes, a Spanish national, in Biarritz. She was issued a United States passport in 1943 after an investigation into her residence in German-occupied France revealed no basis for expatriation. In May, 1944, taxpayers arrived in the United States as refugees from the war. They returned to Biarritz in August, 1946. In 1956 they moved into the Villa Carlotta, in Biarritz, and later moved to the Palace Hotel, St. Moritz, Switzerland, and then to

22 Avenue Eglantine, Lausanne, Switzerland. Since 1956 they have been residents of Lausanne, Switzerland.

4. Mr. Isidro Martin-Montes was in the United States in 1944 and had declared himself exempt from the Selective Service Act. In 1951 he entered the United States on a visitor's visa, but on the advice of attorneys, he left the country and attempted to reenter on an immigrant's visa. This, however, was denied on the grounds that he was ineligible for U.S. citizenship because of the 1944 draft exemption. In 1954 he came to the United States as a "visitor".

5. The taxpayers had two houses in Biarritz, France. The Villa Le Pelican had 30 rooms including three living rooms and two dining rooms, one of which could seat over forty people. It had four terraces, a garden of 85,000 square meters, and three garages. From 1956 taxpayers lived in the Villa Carlotta which had been built as a guest house for the Villa Le Pelican. It had 21 rooms, including a dining room seating more than 20 persons. It had three terraces and a garden of 20,000 square meters. Taxpayers had 14 household employees at all times, in Biarritz. Both houses were furnished with fine furniture, antiques and heirlooms. Taxpayers were members of many social clubs in Biarritz, entertained at their home there frequently, and attended church there. Olga Martin-Montes is listed in Burke's Peerage (under her family name of Leighton) for the years in question as residing in Biarritz. The residence of Olga Martin-Montes at Biarritz for the years in question is certified to by the mayor of Biarritz. Each taxpayer was issued a "carte de sejour de resident privilegie" (certificate for staying as a privileged resident) for the years in question. Such document is issued only

to permanent residents and entitles the holder to most of the rights of a citizen and all the liabilities of taxation.

6. In the late 40's taxpayer had acquired an apartment in Paris to be used during visits there.

7. In 1951 the taxpayers came to the United States to review their financial affairs with Mrs. Martin-Montes' attorney. The attorney warned Mrs. Martin-Montes that she was in danger of losing her United States citizenship because of continuous residence abroad for over five years (see 8 USC 1484(a)(2)). He advised her that to retain her citizenship she should acquire a place to stay in the United States and visit the United States at least once a year.

8. In 1951 taxpayers purchased a cooperative apartment at 960 Fifth Avenue, New York City for \$20,000.00. This had four rooms including two bedrooms. They did not stay there in 1951, however, but stayed at the Hotel St. Regis at a cost of over \$15,000.00. The apartment was furnished thereafter by friends. The annual rent and utilities cost was \$4,000.00. All costs were paid directly by the taxpayers' Chicago attorneys. The taxpayers stayed in the apartment briefly in 1954, 1955, and 1956. They rented a room in the same building for a French maid they had brought with them. The 1956 visit was after the notification of loss of citizenship and during this visit, the apartment was sold.

9. The taxpayers spent the following time in New York State during the years in question: 1952, none; 1953, none; 1954, 51 days;

1955, 34 days; 1956, 39 days.

10. Olga Martin-Montes filed federal tax returns as a resident (Form 1040) and paid taxes on a separate return basis for each of the years 1952 through 1955. Isidro Martin-Montes had paid federal taxes for 1952 as a resident alien. New York returns and taxes were paid for the same years by each taxpayer on a resident basis.

11. Both the acquisition of the cooperative apartment and the payment of taxes on a resident basis were part of a larger plan pursuant to the advice of attorneys, to establish sufficient contacts with the United States to convince the United States Department of State that Mrs. Olga Martin-Montes did reside in the United States and had not expatriated herself. Mrs. Olga Martin-Montes, however, did not carry out other elements of the plan and, in fact, did not even come to the United States in 1952 and 1953. She stated in August, 1956, that she preferred to remain in Europe and that it would be to her own best advantage to give up her United States citizenship.

12. The taxpayer, Olga Martin-Montes, was notified on August 27, 1956 by the U.S. Consulate at Bordeaux, France, that she had lost her citizenship under the provisions of section 352(a)(2) of the Immigration and Nationality Act of 1952 as of December 24, 1952, the effective date of that act. A certificate of such loss of nationality, dated December 20, 1956, is in evidence and such certificate recited as evidence of the loss of nationality certain statements made in a passport application, dated June 25, 1956, and a separate affidavit of the taxpayer. The Department of State of the United States found that the passport of Olga Martin-Montes

should not have been issued in June, 1954, but that the matter had been overlooked until application was made for its renewal in June, 1956.

13. On June 12, 1959, taxpayers filed timely claims for refund of federal taxes paid for the years 1952 through 1956 on the grounds that they were both nonresident aliens during those years. These claims were closed by a notice of adjustment dated September 6, 1962. The preliminary statement (Form 1907) of the federal revenue agent's report with respect to Olga Martin-Montes stated "Taxpayer filed claims for refund for the period beginning December 24, 1952, when she became a nonresident alien, through the close of the calendar year 1956....Taxpayer was a nonresident alien, resident of France... for the entire period under consideration". The preliminary statement with respect to Isidro Martin-Montes stated, "Taxpayer was a nonresident alien, resident of France, during the years 1952 through 1956 ...". A tax was recommended computed on gross income. Taxpayers received substantial refunds for each of the years herein issue. This determination necessarily decided that taxpayers did not become U.S. residents in 1951.

14. On November 20, 1963, the taxpayers each filed a notice of change in taxable income by the United States Treasury Department (Form IT-115) for each of the years here in question and attached thereto the federal notice of adjustment dated September 6, 1962.

Upon the foregoing findings and all the evidence in the case
The State Tax Commission

DETERMINES:

A. The taxpayers never in fact changed their domicile to New York. At all times they intended to maintain their Biarritz

residence as the principal center of their domestic life. The acquisition of the New York apartment and the formal declarations of New York residence on tax returns are insufficient to establish a change of domicile to New York. (See Matter of Trowbridge, 1935, 266 N.Y. 283).

B. The claim for refund is properly based upon a notice of federal changes under the provisions of Tax Law section 373(4). The purpose of those provisions is to enable the State to take advantage not only of federal audits involving the recalculation of numerical data but also of federal investigations of the underlying factual disputes which give rise to tax liability and which can involve the status of persons as well as the character of assets and income. Furthermore, although the ultimate issue in the federal proceeding was different than in this proceeding, the issue in this proceeding of the failure to establish a change of domicile to New York was necessarily determined by implication from the federal determination that these taxpayers did not establish a change in "residence" to the United States within the meaning of the Internal Revenue Code since a change in domicile involves more of a change in living circumstances than does a mere change of residence (See e.g. Friedman 37 T.C. 539 at 552).

C. The applications are granted and the refunds are allowed.

DATED: Albany, New York

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A. The taxpayers never in fact changed their domicile to New York. At all times they intended to maintain their Biarritz

residence as the principal center of their domestic life. The acquisition of the New York apartment and the formal declarations of New York residence on tax returns are insufficient to establish a change of domicile to New York. (See Matter of Trowbridge, 1935, 266 N Y. 283).

B. The claim for refund is properly based upon a notice of federal changes under the provisions of Tax Law section 373(4). The purpose of those provisions is to enable the State to take advantage not only of federal audits involving the recalculation of numerical data but also of federal investigations of the underlying factual disputes which give rise to tax liability and which can involve the status of persons as well as the character of assets and income. Furthermore, although the ultimate issue in the federal proceeding was different than in this proceeding, the issue in this proceeding of the failure to establish a change of domicile to New York was necessarily determined by implication from the federal determination that these taxpayers did not establish a change in "residence" to the United States within the meaning of the Internal Revenue Code since a change in domicile involves more of a change in living circumstances than does a mere change of residence (See e.g. Friedman 37 T.C. 539 at 552).

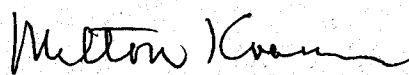
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DATED: Albany, New York

STATE TAX COMMISSION

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COMMISSIONER

Wagel

Redraw - note corrections

Only allow preparatory refund
for 1952 - from Dec 24, 1952 -
12/31/1952 of 29,357.28

Par 3 - When question
mark appears in margin -
sentence is unclear. —

Par 11 - Shouldn't "contacts"
be "contact" —

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She was issued a United States passport in 1943 after an investigation into her residence in German-occupied France revealed no basis of the possibility of voluntary expatriation revealed extenuating *for expatriation.*

circumstances for a stay under German occupation. In May 1944

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The loss of nationality certain

The Department of State is incorrect

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ISIDRO MARTIN-MONTES	:	
for Revision or Refund of Personal	:	DETERMINATION
Income Taxes under Article 16 of the	:	
Tax Law for the year 1952.	:	

In the Matter of the Application	:	
of	:	
OLGA MARTIN-MONTES	:	
for Revision or Refund of Personal	:	DETERMINATION
Income Taxes under Article 16 of the	:	
Tax Law for the years 1952 through	:	
1955.	:	

Each taxpayer having filed applications pursuant to Section 374 of the Tax Law for refund of personal income taxes imposed by Article 16 of the Tax Law for 1952 with respect to Isidro Martin-Montes and for 1952 through 1955 with respect to Olga Martin-Montes and such applications having been denied and a hearing thereon having been demanded and duly held before Nigel G. Wright, Hearing Officer, and the record having been duly examined and considered,

The State Tax Commission hereby

FINDS:

1. The issues herein are (a) whether the taxpayers accomplished a change of domicile from France to New York during the taxable years in question, the taxpayers having changed the position they

took on this issue when filing New York State Tax returns to now assert that no change of domicile occurred, and whether (b) a refund is now due when the ordinary limitations period for refunds has already elapsed but when the Federal authorities have determined that no change of residence from France to New York had occurred and when the taxpayers have filed a timely report of Federal changes under Tax Law Section 373(4) based on such determination.

2. The New York refunds claimed for Olga Martin-Montes are in the following amounts: 1952, \$29,355.28 which includes an amount paid on an assessment of September 13, 1955 in the amount of \$182.56 plus \$14.61 penalty and interest; 1953, \$30,872.98 which includes an amount paid on an assessment of September 13, 1955 in the amount of \$155.81 plus \$12.47 penalty and interest; 1954, \$32,595.48; 1955, \$30,969.02 which unaccountably is \$35.00 less than the amount shown on the return for that year. The refund claimed for Isidro Martin-Montes is \$2,506.88 for 1952.

3. Mrs. Olga Martin-Montes was born in England. She married a United States Citizen, Frank J. Mackey, in 1920, and thereby gained United States citizenship. After Mr. Mackey's death in 1927 she married Antonio de Portago, a Spanish noble, and in 1928 moved to Biarritz, France, where she acquired a residence - the Villa Le Pelican. Thereafter her second husband died and in 1943 she married Isidro Martin-Montes, a Spanish national, in Biarritz. She was issued a United States passport in 1943 after an investigation of the possibility of voluntary expatriation revealed extenuating circumstances for a stay under German occupation. In May 1944 taxpayers arrived in the United States as refugees from the war. They returned to Biarritz in August 1946. In 1956 they moved into the Villa Carlotta, in Biarritz, and later moved to the Palace

Hotel, St. Moritz, Switzerland, and then to 22 Avenue Eglantine, Lausanne, Switzerland. Since 1956 they have been residents of Lausanne, Switzerland.

4. Mr. Isidro Martin-Montes was in the United States in 1944 and had declared himself exempt from the Selective Service Act. In 1951 he entered the United States on a visitor's visa, but on the advice of attorneys, he left the country and attempted to re-enter on an immigrants' visa. This, however, was denied on the grounds that he was ineligible for U.S. Citizenship because of the 1944 draft exemption. In 1954 he came to the United States as a "visitor."

5. The taxpayers had two houses in Biarritz, France. The Villa Le Pelican had 30 rooms including three living rooms and two dining rooms, one of which could seat over forty people. It had four terraces, a garden of 85,000 square meters, and three garages. From 1956 taxpayers lived in the Villa Carlotta which had been built as a guest house for the Villa Le Pelican. It had 21 rooms, including a dining room seating more than 20 persons. It had three terraces and a garden of 20,000 square meters. Taxpayers had 14 household employees at all times, in Biarritz. Both houses were furnished with fine furniture, antiques and heirlooms. Taxpayers were members of many social clubs in Biarritz, entertained at their home there frequently, and attended church there. Olga Martin-Montes is listed in Burke's Peerage (under her family name of Leighton) for the years in question as residing in Biarritz. The residence of Olga Martin-Montes at Biarritz for the years in question is certified to by the mayor of Biarritz. Each taxpayer was issued a "carte de sejour de resident privilegie" (certificate for staying as a privileged resident) for the years in question. Such document is issued only to permanent residents and entitles the holder to most of

the rights of a citizen and all the liabilities of taxation.

6. In the late 40's taxpayer had acquired an apartment in Paris to be used during visits there.

7. In 1951 the taxpayers came to the United States to review their financial affairs with Mrs. Martin-Montes' attorney. The attorney warned Mrs. Martin-Montes that she was in danger of losing her United States citizenship because of continuous residence abroad for over five years (See 8 USC 1484(a) (2)). He advised her that to retain her citizenship she should acquire a place to stay in the United States and visit the United States at least once a year.

8. In 1951 taxpayers purchased a cooperative apartment at 960 Fifth Avenue, New York City for \$20,000. This had four rooms including two bedrooms. They did not stay there in 1951, however, but stayed at the Hotel St. Regis at a cost of over \$15,000. The apartment was furnished thereafter by friends. The annual rent and utilities cost was \$4,000.00. All costs were paid directly by the taxpayer's Chicago attorneys. The taxpayers stayed in the apartment briefly in 1954, 1955, and 1956. They rented a room in the same building for a French maid they had brought with them. The 1956 visit was after the notification of loss of citizenship and during this visit, the apartment was sold.

9. The taxpayer spent the following time in New York State during the years in question: 1952, none; 1953, none; 1954, 51 days; 1955, 34 days; 1956, 39 days.

10. Olga Martin-Montes filed Federal tax returns for a resident (form 1040) and paid taxes on a separate return basis for each of the years 1952 through 1955. Isidro Martin-Montes had paid Federal taxes for 1952 as a resident alien. New York returns and taxes were paid for the same years by each taxpayer on a resident

basis.

11. Both the acquisition of the cooperative apartment and the payment of taxes on a resident basis were part of a larger plan pursuant to the advice of attorneys, to establish sufficient contracts with the United States to convince the United States Department of State that Mrs. Olga Martin-Montes did reside in the United States and had not expatriated herself. Mrs. Olga Martin-Montes, however, did not carry out other elements of the plan and, in fact did not even come to the United States in 1952 and 1953. She stated in August 1956 that she preferred to remain in Europe and that it would be to her own best advantage to give up her United States citizenship.

12. The taxpayer, Olga Martin-Montes, was notified on August 27, 1956, by the U.S. Consulate at Bordeaux, France, that she had lost her citizenship under the provisions of Section 352(a)(2) of the Immigration and Nationality Act of 1952 as of December 24, 1952, the effective date of that act. A Certificate of such loss of nationality dated December 20, 1956, is in evidence and recited as evidence of such loss a passport application dated June 25, 1956, and an affidavit of taxpayer. The United States Department of State has stated that the passport of Olga Martin-Montes should not have been issued in June 1954 but that the matter had been overlooked until a subsequent renewal in June 1956.

13. On June 12, 1959 taxpayers filed timely claims for refund of Federal Taxes paid for the years 1952 through 1956 on the grounds that they were both non-resident aliens during those years. These claims were closed by a notice of adjustment dated September 6, 1962. The preliminary statement (form 1907) of the Federal Revenue agents report with respect to Olga Martin-Montes stated "Taxpayer filed claims for refund for the period beginning December 24, 1952,

when she became a nonresident alien, through the close of the calendar year 1956 ... Taxpayer was a nonresident alien, resident of France ... for the entire period under consideration." The preliminary statement with respect to Isidro Martin-Montes stated, "Taxpayer was a nonresident alien, resident of France, during the years 1952 through 1956 ..." A tax was recommended computed on gross income. Taxpayers received substantial refunds for each of the years here in issue. This determination necessarily decided that taxpayers did not become U.S. residents in 1951.

14. On November 20, 1963, the taxpayers each filed a notice (IT-115) of change in taxable income by the United States Treasury Department for each of the years here in question and attached thereto the Federal notice of adjustment dated September 6, 1962.

Upon the foregoing findings and all the evidence in the case
The State Tax Commission

DETERMINES:

A. The taxpayers never in fact changed their domicile to New York. At all times they intended to maintain their Biarritz residence as the principle center of their domestic life. The acquisition of the New York apartment and the formal declarations of New York residence on tax returns is insufficient to establish a change of domicile to New York. (See Matter of Trowbridge, 1935, 266 N.Y. 283).

B. The claim for refund is properly based upon a notice of Federal changes under the provisions of Tax Law section 373(4). The purpose of those provisions is to enable the State to take advantage not only of Federal audits involving the recalculation of numerical data but also of Federal investigations of the underlying factual disputes which give rise to tax liability and which can involve the status of persons as well as the character of assets and income. Furthermore, although the ultimate issue in the Federal proceeding was different than in this proceeding,

the issue in this proceeding of the failure to establish a change of domicile to New York was necessarily determined by implication from the Federal determination that these taxpayers did not establish a change in "residence" to the United States within the meaning of the Internal Revenue Code since a change in domicile involves more of a change in living circumstances than does a mere change of residence (See e.g. Friedman 37 T.C. 539 at 552).

C. The applications are granted and the refunds are allowed.

DATED: Albany, New York

STATE TAX COMMISSION

COMMISSIONER

COMMISSIONER

COMMISSIONER