

POOR
QUALITY
THE FOLLOWING
DOCUMENT (S)
ARE
FADED & BLURRED

PHOTO MICROGRAPHICS INC.

BUREAU OF LAW

MEMORANDUM

*Income Tax Determination, A-Z
Elbin, Herman Z.*

TO: Commissioners Murphy, Palestin and Macduff

FROM: E. H. Best, Counsel

SUBJECT: Herman Z. Elbin, application for revision or refund of Personal Income Taxes under Article 16 of the Tax Law for the Year 1954

A hearing with reference to the above matter was held before Solomon Sies, Esq. at 80 Centre Street, New York, N. Y., on June 28, 1963. The appearances and the evidence produced were as shown in the stenographic minutes and exhibits submitted herewith.

The issue herein is whether the taxpayer abandoned his domicile in the State of New York and acquired a new domicile in a foreign country on June 10, 1954 so that his income earned in Holland on and after said date for the year 1954 would not be subject to tax as a nonresident of this State.

The facts indicate that until June 1954 the taxpayer resided with his wife and daughter in an apartment in Jackson Heights, New York City; that he and his wife owned a one-family house in Baldwin, L.I., New York where they spent their summers and for about seven months during the year rented it to tenants; that the taxpayer did not rent said house during 1954; that in April, 1954, the taxpayer made an exploratory trip to Rotterdam, Holland and ascertained that because of an acute housing shortage there that it was almost impossible to buy or rent a house; that prior to June 10, 1954, the taxpayer entered into an oral agreement with a New York firm having a controlling interest in a firm in Holland to work in Rotterdam, Holland at a guaranteed minimum salary of \$20,000 per year with the right to engage in independent transactions for himself which would not conflict with the interests of his employer; that the taxpayer offered his home in Baldwin, L.I., New York, for sale in April, 1954; that a contract for the sale of said house was entered on June 21, 1954 reciting that the sellers (taxpayer and his wife) resided in Baldwin, New York; that the closing took place on July 19, 1954 in the absence of the taxpayer and his wife who had executed powers of attorney to their representative to execute necessary documents; that checks totalling \$5,601.39 were sent to the Chase National Bank, for deposit in the taxpayer's joint account at a New York City branch; that the taxpayer sublet his New York City apartment with the furniture and furnishings contained therein on June 10, 1954; that the taxpayer, his wife and daughter left for Holland in June, 1954 and upon their arrival there on June 10, 1954 registered as

American citizens living abroad; that they stayed at a hotel for a period of three weeks; that they then removed to a furnished house in Leidschendam, Netherlands and remained there from July 1, 1954 to November 1, 1955 when the taxpayer removed his furniture and furnishings from New York City to a permanent house in Wassenaar, Netherlands and has lived there ever since; that the taxpayer took a trip from Holland to New York City in February, 1955 and remained here for a short period of time. The taxpayer submitted a copy of Federal audit for 1954, dated December 20, 1957, permitting the taxpayer to eliminate his income earned in Holland on the ground that he gave up his residency in the United States.

While the taxpayer was residing in the furnished house in Holland and prior to his removal on November 1, 1955 to a permanent home, the taxpayer filed a New York State income tax resident return for the year 1954. In such return which was purported to have been executed in New York County on March 1, 1955, he listed his residence as Jackson Heights, New York City reporting in Item 10 as compensation from New York corporation as executive in the commodity department the sum of \$4,851 and on Schedule A (gross income from business) as export representative, Leidschendam, Netherlands, \$12,848.95. After the taxpayer had removed to a permanent home at Wassenaar, Netherlands on November 1955, the taxpayer filed an amended return on July 17, 1956 for the calendar year 1954, listing his residence address as Wassenaar, Netherlands and excluded the income earned in the Netherlands. Thereafter, the taxpayer filed an application for refund of a portion of the taxes paid on his original return.

Under section 350(7) of the Tax Law, for the purpose of income taxes, the definition of the word "resident" includes a natural person who is domiciled in the State of New York, and who spends in the aggregate more than thirty days of the taxable year within the State.

Article 502 of the Personal Income Tax Regulations provides, in part, that "domicile is the place where one lives and has his principal establishment, every person having one and only one; actual residence is not necessarily domicile, for domicile is the fixed place of habitation, including a residence which in the intention of the taxpayer is permanent rather than transitory; that a domicile once obtained continues until a new one is acquired; that the avowed intention controls, and there must be both intent to change and actual change; that the mere belief that one has performed some act which is the equivalent of a change is insufficient; that the domicile is not changed by removal for a definite period or for particular purposes by abandonment of the old domicile until the acquisition of new one is effected."

Generally, a person who gives up his place of abode in New York State and moves with his family and personal effects to another state where he acquires a new place of abode with the intention of residing in the new abode permanently or for an indefinite period, with no intent to return to New York State, can be considered as having effected a change of domicile. However, there is a strong presumption against change of domicile to a foreign country. Therefore, in order to establish such a change of domicile, a stronger degree of proof is required than in the case of a change of domicile to another state. Under this rule, a New York domiciliary who moves, with his family and effects, to another country, because of assignment there by his employer or for study or research in such country, etc., is considered as having retained his New York domicile, unless he furnishes satisfactory evidence that he entered such county with the intention of residing there permanently. Statement of Policy, Income Tax Bureau, Part I, November 30, 1955.

Since the taxpayer was aware of the fact that it was almost impossible for him to obtain permanent living quarters in Rotterdam, Holland when he made the exploratory trip in April, 1954, he could not at that time have intended to abandon his domicile in New York. Although the taxpayer contends that in June, 1954, he sublet his New York City apartment with the furniture and furnishings contained therein in order to save storage costs until he was able to procure an unfurnished house which he could rent or purchase, it was evident that he had not at that time acquired a new domicile in Holland. This is further confirmed by the fact that when the taxpayer and his family arrived in Holland on June 10, 1954, they stayed at a hotel for about three weeks until they were able to find a furnished house where they remained until November, 1955 when the taxpayer was able to find a permanent home and have his furniture and furnishings removed from New York. The representative for the taxpayer was unable to state whether the taxpayer entered Holland on a temporary or permanent visa. The original income tax return of the taxpayer for 1954 reciting his residence address as Jackson Heights, New York City and dated in New York County on March 1, 1955, indicates that even as late as March, 1955, the taxpayer still considered himself to be domiciled in the State of New York. Only after moving to a permanent home in November 1955 did the taxpayer file an amended return and consider himself to be domiciled outside of New York. It is clear that the taxpayer did not acquire a new domicile in Holland until after November 1955. The taxpayer did not acquire a new domicile in Holland until November, 1955. The taxpayer has failed not only to prove that he abandoned his domicile in New York during the year 1954, but he has also failed to prove both an avowed intention to acquire a new domicile and an actual change of domicile in Holland on June 10, 1954 or any subsequent part of 1954.

The Internal Revenue Code does not have any similar provision defining the word "resident" as that contained in the New York Income Tax Law. Therefore, the decision of the Internal Revenue Service permitting the taxpayer a refund of

taxes on income earned abroad is not controlling in the instant case.

Based on the above findings, the hearing officer held that the taxpayer was a resident of this State during the entire year of 1954 for income tax purposes in accordance with section 380(7) of the Tax Law. I am in accord with this opinion.

Counsel

MSica
Enc.

September 20, 1965

STATE OF NEW YORK
STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION OF
HERMAN Z. ELBIN
FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEAR 1954

An application for revision or refund having been filed by the taxpayer herein, Herman Z. Elbin, for the year 1954 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York on June 28, 1963, before Solomon Sies, hearing officer for the Department of Taxation and Finance, at which hearing the taxpayer was represented by David L. Lieb & Co. by William Weiss, CPA, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer in 1954 and at all times related to the issues herein was and continued to be a citizen of the United States.

(2) That for a number of years prior to June 1954, the taxpayer and his family maintained and lived in an apartment in Jackson Heights in the State of New York, and during the summer months, a dwelling house in Baldwin, New York which the taxpayer then owned.

(3) That beginning in or about June of 1954, the taxpayer was an employee of a business firm, Chilwich Sons & Company, a partnership whose principal address was in the City of New York,

and of its controlled subsidiary firm, N. V. Handelsmij E. Schroder, in Rotterdam, the Netherlands; that the taxpayer moved to the Netherlands in consequence of an oral agreement of employment entered into at New York with the said New York firm, permitting the taxpayer to engage in independent transactions for himself which would not conflict with the interests of his employer. The taxpayer was also self-employed in the export-import business during this time.

(4) That in June 1954, the taxpayer left for Holland, together with his family, and arrived in the Netherlands on June 10, 1954, staying at a hotel for three weeks and then removing to a furnished house in Leidsendam, remaining there until November 1, 1955.

(5) That on March 1, 1955 and while the taxpayer was occupying the furnished house, the taxpayer filed a New York State resident income tax return for the year 1954 listing his residence as Jackson Heights, New York, in which return he reported for the year compensation as an employee of Carl M. Loeb Rhoades & Company, New York, New York in the amount of \$4,615 and net income from a business or profession conducted in the Netherlands in the amount of \$11,895.95.

(6) That the taxpayer sold the dwelling house that he owned in Baldwin, New York in July 1954, depositing the checks from such sale in the taxpayer's account in a New York City bank; that on June 10, 1954, the taxpayer sublet his apartment, furnished with his household furniture, to a subtenant under a sublease pursuant to the terms of which he could recover the possession of the apartment on three months' notice to the tenant; that on November 1, 1955, the taxpayer moved from the furnished house to Wassenaar, Netherlands, where he has lived

ever since, surrendering his apartment in New York and removing the furniture and furnishings to his Holland home.

(7) That on July 17, 1956 after the taxpayer removed to Wassenaar, Netherlands, the taxpayer filed an amended return for the calendar year 1954 listing such address as his residence and excluding in such amended return the income earned in the Netherlands; thereafter, the taxpayer filed an application for refund of a portion of the taxes paid on his original return.

(8) That the taxpayer did not intend to abandon and did not abandon his New York State domicile and acquire a new domicile during the calendar year 1954; that, accordingly, the taxpayer continued to be a domiciliary of the State of New York during the year 1954.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

DETERMINES:

(A) That since the taxpayer was domiciled in the State of New York during the entire taxable year and spent more than 30 days of the taxable year in this State, the taxpayer was a resident of the State of New York for income tax purposes during the entire year of 1954 in accordance with section 350, subdivision 7 of the Tax Law, and consequently was subject to a tax on his entire income earned during said year.

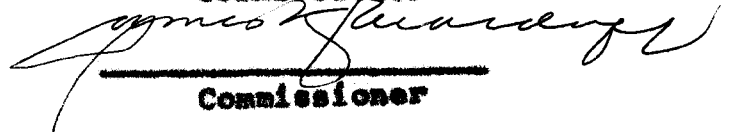
(B) That, accordingly, no recomputations, revision, resettlement or refund of taxes for the year 1954 can be made and that the application for refund filed with respect to the same is hereby denied.

DATED: Albany, New York this 18th day of October, 1956.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ IRA J. PALESTIN
Commissioner


James J. Flanagan
Commissioner