

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert C. & Gertrude A. Fielding :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Years 1970, 1971, 1973-1975. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

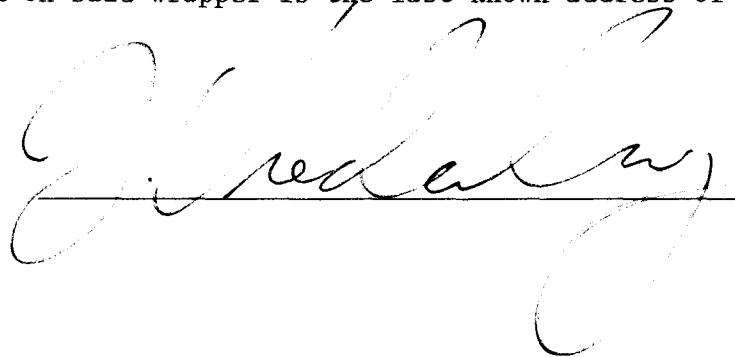
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of July, 1980, he served the within notice of Decision by certified mail upon Robert C. & Gertrude A. Fielding, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert C. & Gertrude A. Fielding
3930 Oaks Clubhouse Dr., Apt. 508
Pompano Beach, FL 33060
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
25th day of July, 1980.

Deborah A. Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

Robert C. & Gertrude A. Fielding :

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for Redetermination of a Deficiency or a Revision :
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Personal Income Tax :
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for the Years 1970, 1971, 1973-1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 25th day of July, 1980, he served the within notice of Decision by certified mail upon Harold L. Fisher and Kenneth K. Fisher the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Harold L. Fisher and Kenneth K. Fisher
Fisher & Fisher
188 Montague St.
Brooklyn, NY 11201

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
25th day of July, 1980.

Dorothy A. Bank

J. Vredenburg

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

July 25, 1980

Robert C. & Gertrude A. Fielding
3930 Oaks Clubhouse Dr., Apt. 508
Pompano Beach, FL 33060

Dear Mr. & Mrs. Fielding:

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, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harold L. Fisher and Kenneth K. Fisher
Fisher & Fisher
188 Montague St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
ROBERT C. FIELDING and GERTRUDE A. FIELDING : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Years 1970, 1971, :
1973, 1974 and 1975. :

Petitioners, Robert C. Fielding and Gertrude A. Fielding, 3930 Oaks Clubhouse Drive, Apt. 508, Pompano Beach, Florida 33060, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for 1970 by Gertrude A. Fielding, for 1970 and 1971 by Robert C. Fielding, and for 1973 through 1975 by both Robert C. and Gertrude A. Fielding (File Nos. 19422, 19423 and 19424).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 21, 1979 at 9:30 A.M. Petitioners appeared by Fisher & Fisher, Esqs. (Harold L. Fisher, Esq. and Kenneth K. Fisher, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Samuel J. Freund, Esq., of counsel).

ISSUES

- I. Whether petitioner Robert C. Fielding was a domiciliary of New York for 1970 and 1971.
- II. Whether petitioners were domiciliaries of New York for years 1973 through 1975.
- III. Whether the Income Tax Bureau's claim against petitioner Gertrude A. Fielding for 1970 is time barred.

FINDINGS OF FACT

1. On April 14, 1977, the Income Tax Bureau issued a Notice of Deficiency to Gertrude A. Fielding asserting minimum income tax due of \$98.98, plus interest, for 1970. On the same date, another Notice of Deficiency was issued to Robert C. Fielding for \$28,204.53, plus interest, for 1970 and 1971. On the same date, a third Notice of Deficiency was issued to Robert C. Fielding and Gertrude A. Fielding for \$19,005.71, plus interest, for 1973 through 1975.

2. Robert C. Fielding was born in 1909. Late in 1968, petitioners considered moving to Florida. Concerning this decision, Mr. Fielding testified as follows at the formal hearing:

We had at that time considered selling our house in Westchester, and then in discussions with my wife it became apparent I was approaching an age when my health was not in that good shape and we just decided well, the heck with it, let's sell the big house. The children are away and I wanted to move to where my brother was and that's what happened. So we went down to Florida and we were going to go into this Ibis apartment and temporarily live with my brother and, as you know, that didn't work out... (Tr. p. 72.)

3. In January of 1969, petitioners sold their house and property in Mamaroneck, New York. The house had a living room, dining room, guest living room, guest bedroom suite, four bedrooms, four baths, two maids' rooms and a bath, pool, cabana and garage.

4. That same month, petitioners went to Coral Gables, Florida, to stay at the house of Mr. Fielding's brother.

Petitioners entered into a contract to purchase a luxurious apartment on Ibis Island in Palm Beach, in a building then under construction. The apartment had three bedrooms, a large living room and a hundred-foot terrace overlooking Lake Worth.

Petitioners subsequently learned that the housing developer was not living up to his contractual commitments by not building the swimming pools and tennis courts which had been promised. As a result, petitioners withdrew from their agreement to purchase the Ibis Island apartment.

Mr. Fielding testified at the formal hearing as follows with regard to what occurred subsequently:

At that time my brother said to me -- by the way, we were four brothers and this is the only one left, and we are in certain businesses together -- he said, look, my children have left, I have got a lovely home here, we would love to have you, why don't you come in and move in with us;... (Tr. p. 16)

5. Mr. Fielding's brother owned the house into which petitioners moved in 1969 at 815 Catalonia Avenue, Coral Gables, Florida. Petitioners continued to live in this house for the next eight years. The house is on a half acre in one of the most prestigious areas of Coral Gables. It has four bedrooms, a den, a Florida room and living area, a two-car garage, and a swimming pool.

The two brothers and their wives occupied the house. Mr. Fielding testified that "[w]e were pretty well settled and enjoying our business of living together. My wife and his wife got along perfectly and had common interests, so it worked out." (Tr. p. 73.)

Petitioners did not share in the expense of the Coral Gables house. Mr. Fielding testified that "[h]e (Mr. Fielding's brother) didn't allow me to contribute; no more than I would allow him." (Tr. p. 24.)

6. A temporary driver's permit was issued to Mr. Fielding by the Florida Department of Highway Safety and Motor Vehicles on July 26, 1970. A license was issued on September 4, 1970. Mr. Fielding registered to vote in Florida on July 29, 1970. He opened a bank account in September of 1970 in Coral Gables. When filing his 1970 Federal tax return, Mr. Fielding used the Catalonia Avenue, Coral Gables, Florida, address on his return.

7. On January 29, 1969 and on September 9, 1971, Mr. Fielding executed a will in the State of Florida. In the 1969 will, he is described as "being domiciled in the State of Florida". In the 1971 will, he is described as being "of the City of Coral Gables, County of Dade, State of Florida".

8. During the years in question, Mrs. Fielding, who suffers from rheumatoid arthritis, would visit the spa at Palm-Aire in Coral Gables for treatment. In 1978, petitioners left the brother's house after purchasing a condominium apartment at Palm-Aire so that Mrs. Fielding, whose arthritis had worsened, could benefit from daily access to the spa's restorative facilities. After moving into their Palm-Aire condominium apartment, Mr. Fielding applied for a \$5,000 homestead exemption from the Broward County, Florida, property appraiser. Mr. Fielding was granted an additional \$5,000 exemption which is available only to senior citizens who have been residents of Florida for five or more years prior to the date of filing.

9. In 1968, petitioners had purchased a cooperative apartment at 860 United Nations Plaza, New York, New York. Mr. Fielding described the apartment as a "pied-a-terre". The apartment has one bedroom, a den, which can be used as a second bedroom, a large living room and a small alcove in the kitchen for eating. The apartment was empty most of the time. Petitioners would use it on their occasional trips to New York from Florida. Sometimes their sons or Mr. Fielding's brother and his wife would use it.

Petitioners considered selling the apartment. In 1975, brokers brought people around to view the apartment; however, due to the depressed condition of the sales market at that time, the apartment was not sold.

A few pieces of furniture from the Mamaroneck home were moved into the U.N. Plaza apartment. Other pieces were given to petitioners' sons, and still others were taken by petitioners to Florida, while some of the furniture was put in storage in New York.

10. Mrs. Fielding had worked for a number of years at Jacobi Hospital in the Bronx. During 1970, she would occasionally return to New York to visit the hospital to tend to certain patients to whom she felt a special obligation. In 1970, she received \$1,493.45 for her work at the hospital. She reported this income when filing a 1970 resident tax return. During 1970, Mrs. Fielding spent fifty to sixty days in New York, and she would stay at the U.N. Plaza apartment.

11. During the period in question, Mr. Fielding maintained numerous bank accounts in New York for business purposes. The business accounts were for various joint ventures and partnerships. Over a period of fifty years, the accounts had been with either the Chemical Bank or Citibank. He also maintained a personal bank account in New York "for continuity purposes". (Tr. p. 57.)

12. Mr. Fielding served as a trustee of his deceased brother's estate. A bookkeeper who had worked for Mr. Fielding's deceased brother continued to work in New York for the estate. The bookkeeper handled various transactions for Mr. Fielding, some of which were of a personal nature.

13. Mr. Fielding owned an interest in two properties in New York. The income from these properties constituted a very small part of his income. Mr. Fielding's major financial interests were located in Florida and in other southern states, as well as in some of the western states. Mr. Fielding maintained no office in New York.

14. Mr. Fielding continued his membership in a Mamaroneck Beach Club until 1974 or 1975. As to continuing his membership after moving to Florida, Mr. Fielding testified:

The initiation fee was \$15,000 at that time and I had many discussions as to whether we should give it up or not give it up, because my children could attend. (Tr. p. 56.)

15. In a decision dated September 3, 1975, the State Tax Commission held that Mr. Fielding failed to establish a change of domicile from New York to Florida in January, 1969. This determination was confirmed by the Appellate Division, 3rd Dept., on July 15, 1976.

CONCLUSIONS OF LAW

A. That "to effect a change of domicile, there must be an actual change of residence, coupled with an intention to abandon the former domicile and to acquire another". Aetna Nat'l. Bank v. Kramer, 142 App. Div. 444, 126 N.Y.S. 970 (1st Dept., 1911).

B. That during the period in dispute, petitioners were domiciliaries of Florida. In this five-year period, they lived with Mr. Fielding's brother and his wife. The brothers were close, the two remaining survivors of four brothers, and their wives got on well. The children of both families were grown up and no longer lived with their parents. The brothers shared many business interests. The brother's house was of a size that it could comfortably accommodate petitioners, enabling them to live in the luxurious style to which they were accustomed. The mild Florida climate was important to petitioners, neither of whom was in good health. In 1970, Mr. Fielding registered to vote in Florida, was issued a driver's license, and opened a bank account in Coral Gables. When filing his Federal tax returns in 1970 and in subsequent years, Mr. Fielding used his Florida address on the returns.

While petitioners maintained a small apartment in New York City, the apartment remained empty most of the time and was used by petitioners only on their occasional visits to New York. Mr. Fielding had business interests in New York, but they were of a minor nature compared with his interests in Florida and in other parts of the country.

C. That the Notice of Deficiency issued to petitioner Gertrude A. Fielding for 1970 for failure to report or disclose an item of tax preference was not time barred and was issued within the period prescribed in section 683(d) (1) of the Tax Law. However, petitioner Gertrude A. Fielding's domicile for 1970 was the same as that of her husband petitioner Robert Fielding and, as a result, she was a nonresident individual of New York during 1970 and was taxable only on those items of income, gain, loss and deduction derived from or connected with New York sources within the meaning and intent of section 632(b) of the Tax Law and 20 NYCRR 131.2.

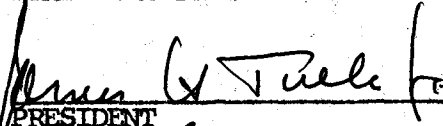
D. That the petition of Robert C. Fielding for 1970 and 1971 and the petition of Robert C. Fielding and Gertrude A. Fielding for the years 1973 through 1975 are granted and the notices of deficiency issued on April 14, 1977 are cancelled.

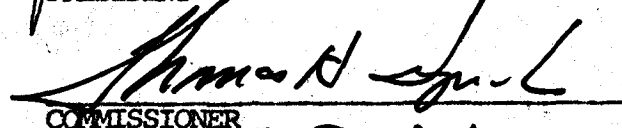
E. That the petition of Gertrude A. Fielding for 1970 is granted and the Notice of Deficiency issued on April 14, 1977 is cancelled. The Audit Division is hereby directed to authorize any refund which may be due.

DATED: Albany, New York

JUL 25 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER