

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
David W. & Carolyn K. Elvidge :
: AFFIDAVIT OF MAILING
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 1972 & 1973 :

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 10th day of April, 1981, he served the within notice of Decision by certified mail upon David W. & Carolyn K. Elvidge, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David W. & Carolyn K. Elvidge
50 Glendale Terrace
Orchard Park, NY 14217

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
10th day of April, 1981.

Carrie A. Hageland

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
David W. & Carolyn K. Elvidge :
: AFFIDAVIT OF MAILING
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 :
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:

State of New York
County of Albany

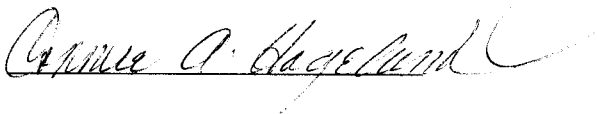
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of April, 1981, he served the within notice of Decision by certified mail upon Michael P. Przestowski the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

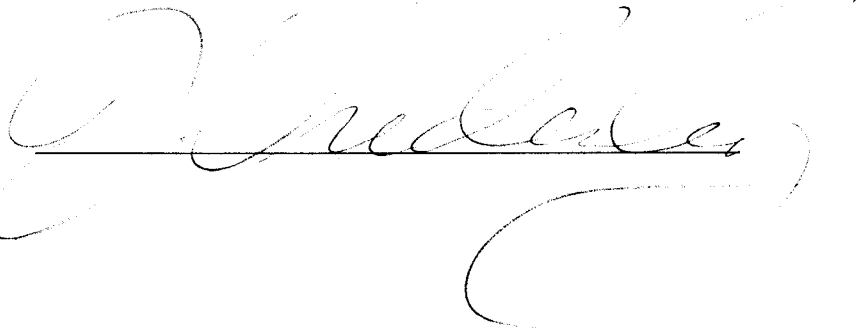
Mr. Michael P. Przestowski
105 Sharon Dr.
W. Seneca, NY 14224

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
10th day of April, 1981.


Carmine A. Hagedorn


Jay Vredenburg

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

April 10, 1981

David W. & Carolyn K. Elvidge
50 Glendale Terrace
Orchard Park, NY 14217

Dear Mr. & Mrs. Elvidge:

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
Michael P. Przestowski
105 Sharon Dr.
W. Seneca, NY 14224
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DAVID W. ELVIDGE and CAROLYN K. ELVIDGE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1972 and 1973.	:	

Petitioners, David W. Elvidge and Carolyn K. Elvidge, 50 Glendale Terrace, Orchard Park, New York 14217, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 and 1973 (File No. 17260).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on July 7, 1980 at 2:45 P.M. Petitioners, David W. Elvidge and Carolyn K. Elvidge, appeared with Michael Przestawski. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner David W. Elvidge was a domiciliary of New York State for each of the entire years 1972 and 1973.

FINDINGS OF FACT

1. Petitioners, David W. Elvidge and Carolyn K. Elvidge, timely filed New York State combined income tax returns, IT-208 for the years 1972 and 1973. Subsequently, an amended IT-209, New York State Combined Income Tax Return for 1972, was filed indicating a period of residence from January 1, 1972 to June 23, 1972. On the New York State resident returns filed by the petitioners for the tax years 1972 and 1973, they excluded \$6,956.00 and

\$8,780.00, respectively. This was relating to income earned by the petitioner David W. Elvidge while working in Virginia for the period June 26, 1972 through August 18, 1973.

2. On September 27, 1976, the Audit Division issued a Notice of Deficiency and an accompanying Statement of Audit Changes stating that "both spouses are held to be residents of New York State subject to tax on all wages regardless of where earned. Mr. Elvidge's Virginia income is added to the income reported on their resident income tax returns for the years 1972 and 1973. To minimize the total tax liability of both spouses, the standard deduction has been applied against husband's tax. No resident credit has been applied because we have not received copies of State Virginia income tax returns."

Accordingly, the Notice against petitioners, imposed additional personal income tax of \$1,013.55 plus interest of \$219.67 for a total due of \$1,233.22.

3. Petitioner Carolyn K. Elvidge stated that she was a resident and domiciliary of New York State for 1972 and 1973. That she was a full time employee of Union Carbide Corporation and also attending college working toward a bachelor of science degree during the years at issue.

4. In May 1972, petitioner David W. Elvidge left his residence at 41 East Northrup Place, Buffalo, New York and moved in with a friend because of marital difficulties. In June 1972, petitioner David W. Elvidge acquired employment in Roanoke, Virginia with the Virginia Hospital Association. Petitioner David W. Elvidge moved all of his belongings from New York State to Virginia and leased an apartment on an yearly basis in Roanoke, Virginia. Petitioner David W. Elvidge acquired a Virginia drivers' license, opened a bank account and acquired credit in the State of Virginia. Though not a member of clubs or organizations in New York State, petitioner became an

active member of the Hospital Management Systems Society, Piedmont Chapter of the American Hospital Association and the Roanoke Jaycees.

In February 1973, petitioner David W. Elvidge accepted a promotion with Virginia Hospital Association in Fairfax, Virginia. Petitioner David W. Elvidge moved from Roanoke, Virginia and took another year lease on an apartment in Fairfax, Virginia. Subsequently, the department for which petitioner David W. Elvidge was working was to be abolished. Petitioner began looking for new employment, took a test with the United States Postal Service in Washington D.C. for management engineering position and passed. Petitioner resigned his position with Virginia Hospital Association on August 1, 1972 and was sent by the postal service to Buffalo, New York to work on August 19, 1973.

5. During the period of the petitioners' mutual separation, petitioner David W. Elvidge provided no financial support to Carolyn K. Elvidge nor did they have contact with each other other than to file Federal and state tax returns for 1972. This was done through their tax preparer for certain tax benefits.

6. At the time petitioner David W. Elvidge left for Virginia, petitioner Carolyn K. Elvidge's intention was to graduate from college before joining her husband if their marriage difficulties were resolved.

7. Subsequently, after petitioner David W. Elvidge returned to Buffalo, only because of new employment with the United States Postal Service, the petitioners resolved their marriage problems.

8. Petitioner David W. Elvidge paid Virginia income tax as a permanent resident on in the amount of \$202.00 and \$272.00 for 1972 and 1973 respectively.

CONCLUSIONS OF LAW

A. That to effect a change of domicile only two elements are necessary. A taxpayer must take up residence at the new domicile and he must intend to

abandon his prior domicile and to adopt the new place of residence as his fixed, true and permanent home to which he would have the intention of returning whenever absent (Berhalter v. Irmisch 75 F.R.D. 539). In order to effect a change of domicile, it is unnecessary that one never again set foot in his former domicile (Rosenthal v. Rosentiel, 368 F. Supp. 51, affirmed 503 F. 2d 1397). A change of residence for even a short time with the intention in good faith to change the domicile is sufficient (Matter of Newcombe, 192 NY 238, Gromel v. Gromel, 22 Misc. 2d 33). The question of change of domicile is one of fact, not of law and frequently depends on a variety of circumstances (Matter of Brunner, 41 N.Y. 2d 917, 918).

B. That petitioner David W. Elvidge did acquire a domicile in Virginia. The acts of petitioner David W. Elvidge in June 1972, when he took up residence in his rented home in Roanoke, Virginia, confirmed his stated intention to make that residence his domicile. Petitioner David W. Elvidge completely abandoned his New York domicile. He terminated all New York affiliations and established affiliations with banks, organizations and governments within Virginia. Petitioner David W. Elvidge at the time of his change of domicile expected his employment in Virginia to continue indefinitely. Petitioner registered and paid taxes in Virginia as a permanent resident. It has clearly been shown that petitioner David W. Elvidge changed his domicile in 1972 from New York to Virginia.

C. That petitioner Carolyn K. Elvidge was a domiciliary of New York State for all of 1972 and 1973 though ordinarily a wife's domicile follows that of her husband, but if they are separated, in fact, she may under some circumstances, acquire her own separate domicile, even though there be no judgement or decree of separation. [20 NYCRR 102.2(d)(5)]

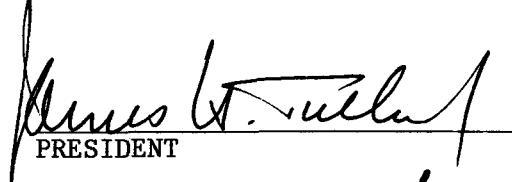
D. That petitioner David W. Elvidge did reacquire his New York domicile upon returning to New York. That the Audit Division is directed to recompute the Notice of Deficiency issued September 27, 1976, excluding income earned by petitioner David W. Elvidge while domiciled in Virginia, in accordance with section 611(b)(3) of the Tax Law, to minimize the total tax liability of petitioners by applying the standard deduction to their benefit in accordance with section 614(b) of the Tax Law and prorate the exemption in accordance with section 654(e) of the Tax Law.

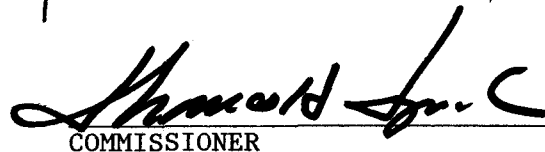
E. That the petition of David W. Elvidge and Carolyn K. Elvidge is granted to the extent indicated in Conclusion of Law "D" and that except as so granted, is in all other respects denied.

DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER