

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gordon J. & Jacqueline Keller :
: 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 Year :
1977. :

State of New York
County of Albany

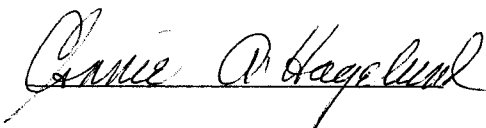
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Gordon J. & Jacqueline Keller, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

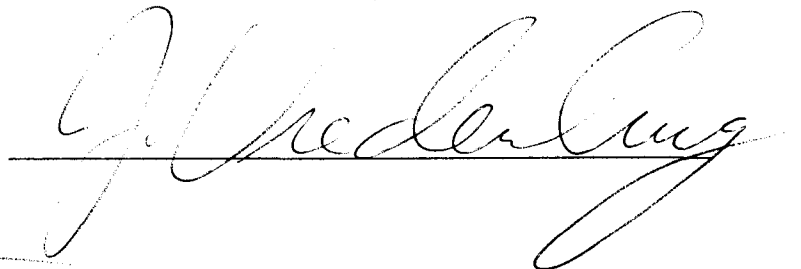
Gordon J. & Jacqueline Keller
330 S. First St.
Lewiston, NY 14092

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
14th day of August, 1981.


Carrie A. Haglund


Jay Vredenburg

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

August 14, 1981

Gordon J. & Jacqueline Keller
330 S. First St.
Lewiston, NY 14092

Dear Mr. & Mrs. Keller:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GORDON J. KELLER and JACQUELINE KELLER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1977.	:	

Petitioners, Gordon J. Keller and Jacqueline Keller, 330 South First Street, Lewiston, New York 14092, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1977 (File No. 29522).

On April 20, 1981, petitioner, Gordon J. Keller advised the State Tax Commission, in writing, that he desired to waive a small claims hearing and to submit the case to the State Tax Commission on the entire record contained in the file.

ISSUES

I. Whether petitioners move to Mexico City, Mexico during 1977 terminated their status as New York domiciliaries.

II. Whether New York State Tax Laws for establishing a change of residence within and without the United States are discriminatory and results in violation of petitioners constitutional rights.

FINDINGS OF FACT

1. Petitioners, Gordon J. Keller and Jacqueline Keller filed New York State Income Tax Resident Return for 1977 which showed an overpayment of personal income tax of \$1,139.44. Attached thereto was a Schedule for Change

of Resident Status on which petitioners indicated there period of New York State residence was from January 1, 1979 to June 30, 1977.

2. On April 14, 1980, the Audit Division issued a Notice of Disallowance that disallowed \$708.75 of petitioners claim for refund. The disallowance was based on a Statement of Refund Adjustment which held that; "...when a resident of New York State goes abroad under circumstances other than a complete and permanent removal from the United States, the individual remains taxable as a resident of this State on all income received irrespective of the source unless, during the taxable year he fulfills all three of the following requirements:

1. Maintained no permanent place of abode in The State during the taxable year.
2. Did maintain a permanent place of abode outside The State during the entire taxable year, and
3. Was in the State for an aggregate period of not more than 30 days during such year.

3. Petitioner Gordon J. Keller was employed by Carbordum Company (hereinafter "Company"). During the latter part of June, 1977, the company assigned petitioner to Mexico for a period of two to four years as project manager for the construction of a new silicon carbide manufacturing facility. As a result of said assignment to Mexico, petitioners sold their home, car and most of their furnishings located in New York State.

4. Upon completion of the Mexican facility, petitioner expected to be assigned as a project manager for facilities to be built by the Company in Venezuela and Austrailia. However, the company cancelled its plans for these latter facilities and petitioner returned to New York in 1979.

5. Petitioners contended that he planned to be working outside of the United States until such time as he chose to retire.

6. Petitioner argued that had the company assigned him to another state within the United States instead of abroad, then the income earned after his removal would not be subject to New York State personal income tax. Therefore, he maintains the New York State Tax Law is discriminatory and results in violation of petitioners constitutional rights.

CONCLUSIONS OF LAW

A. That petitioners failed to establish that their move to Mexico was made with the bona fide intention of making their 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 (20 NYCRR 102(d)(2)). That a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home ther. 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 (20 NYCRR 102.2(d)(2)).

B. That the presumption against a foreign domicile is stronger than the general presumption against a change of domicile. Less evidence is required to establish a change of domicile from one state to another, than from one nation to another (Matter of Newcomb, 192 N.Y.238; Matter of Bodfish v. Gallman, 50 A.D.2d 457). A United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently (20 NYCRR 102.2(d)(3)). Petitioners failed to establish that they intended to remain in Mexico permanently, therefore, petitioners are New York domiciliaries.

C. That since petitioners were domiciliaries of New York State for 1977, and failed to satisfy all three of the criteria set forth in section 605(a)(1) of the Tax Law, which would have enabled them to be treated as nonresidents although domiciled in New York, they are New York State residents for 1977 within the meaning and intent of section 605(a)(1) of the Tax Law and 20 NYCRR subdivisions 102.2(a) and 102.2(b), and therefore, subject to tax on income received from all sources.

D. That the constitutionality of the laws of the State of New York are presumed by the New York State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional. Therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of income tax liability on the petitioners.

E. That The petition of Gordon J. Keller and Jacqueline Keller is denied and the Notice of Disallowance dated April 14, 1980 is sustained.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER