

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Roger & Ann L. Kennedy :

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 :
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 31st day of July, 1981, he served the within notice of Decision by certified mail upon Roger & Ann L. Kennedy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Roger & Ann L. Kennedy
8 Ridgewood Dr.
Plattsburgh, NY 12901

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
31st day of July, 1981.

Annie A. Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Roger & Ann L. Kennedy :

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 :
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 31st day of July, 1981, he served the within notice of Decision by certified mail upon Sanford Saffee the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sanford Saffee
Kessler, Bernstein & Jaffe
75 State St.
Albany, NY 12207

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
31st day of July, 1981.

Bennie A. Hagelund

J. Vredenburg

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

July 31, 1981

Roger & Ann L. Kennedy
8 Ridgewood Dr.
Plattsburgh, NY 12901

Dear Mr. & Mrs. Kennedy:

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
Sanford Saffee
Kessler, Bernstein & Jaffe
75 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROGER P. KENNEDY and ANN KENNEDY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1973.	:	

Petitioners, Roger P. Kennedy and Ann Kennedy, 8 Ridgewood Drive, Plattsburgh, New York 12901, 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 1973 (File No. 11846).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on September 21, 1978 and January 16, 1980 at 2:45 P.M. and 10:45 A.M. respectively. Petitioners appeared by Sanford Jaffee, CPA. The Audit Division appeared by Peter Crotty and Ralph J. Vecchio, Esqs. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the petitioners changed their domicile from New York State to the State of Florida on March 1, 1973.

II. Whether income received from Hammond Lane Mechanicals, Inc. is to be considered compensation received for past services performed in New York State and therefore fully taxable to New York State.

FINDINGS OF FACT

1. Petitioners, Roger P. and Ann Kennedy, timely filed a New York State Income Tax Nonresident Return for 1973. On this return they indicated their period of New York residence to be January 1 to February 28, 1973.

2. On May 28, 1974, the Income Tax Bureau requested the petitioners to refile using both resident and nonresident returns and that upon receipt it would give consideration to the petitioners' claimed refund. The petitioners refiled as requested on August 20, 1974.

3. On February 27, 1975, the Income Tax Bureau issued a Statement of Audit Changes against petitioners imposing additional personal income tax due for 1973. This was done on the following grounds:

(a) The consultation income received from Hammond Lane Mechanicals, Inc. in the amount of \$13,300.00 was considered to be compensation received for past services performed in New York State and fully taxable to New York State on petitioners' nonresident return.

(b) For Internal Revenue Service purposes, 50 percent of the excess of the net long-term capital gain over the short-term capital loss was subject to tax. For New York State income tax purposes, 60 percent of such excess was subject to tax. Therefore, a modification was required increasing Federal adjusted gross income in the amount of 20 percent of the long-term capital gain deduction.

(c) Where two returns are filed because of change of residence, the tax due may not be less than would be payable if the taxable income shown on the two returns were included in a single return.

(d) Withholding tax in the amount of \$549.00 was not paid to New York State, and therefore, could not be claimed as New York State withholding tax.

Accordingly it issued a Notice of Deficiency on October 27, 1975 against petitioners, imposing personal income tax for 1972 of \$2,508.11, plus \$179.54 in interest, less overpayment shown on return of \$947.83, for a total amount due of \$1,739.82.

4. At the hearing the petitioners conceded that the Income Tax Bureau was correct as far as its contentions designated as "(b)" and "(c)" in Finding of Fact "3" were concerned, therefore, these items were not at issue. The Audit Division conceded that the \$549.00 withholding tax was paid to New York State based on the company records presented by petitioners and therefore the petitioners are entitled to claimed New York State withholding tax of \$549.00.

5. From March 1, 1973 through December 31, 1973 petitioner, Roger P. Kennedy, while residing and working in Florida, earned \$13,300.00 from Hammond Lane Mechanicals, Inc. for consulting services. These services consisted of telephone communication with Hammond Lane Mechanicals in an attempt to further the corporation's operation in the State of Florida. The petitioner performed no personal services in New York State during March 1, 1973 through December 31, 1973.

6. During the hearing, the Audit Division claimed a greater deficiency than that asserted in the Notice of Deficiency, on the grounds that the petitioners did not change their domicile to Florida.

7. It was the intention of petitioners to move from New York State and take up permanent residence in the State of Florida. Petitioners moved from their Morrisonville, New York, house to a leased apartment in Winter Park, Florida, on March 1, 1973 taking all furniture and belongings with them. On July 19, 1973 the petitioners purchased a house at 359 Elkhorn Court, Winter Park, Florida. Prior to leaving New York State, petitioner Roger Kennedy, was

president and general manager of Roger P. Kennedy General Contractor, Inc. and president of a subsidiary Hammond Lane Mechanicals, Inc. The corporation started a division of Roger P. Kennedy General Contractor, Inc. in Orlando, Florida in January, 1973. The principal business address for Roger P. Kennedy General Contractor, Inc. was 1655 Acme Street, Orlando, Florida 32805. The corporation was in the general construction business in Florida, building large housing developments.

8. Other evidence presented by the petitioners to show that it was their intention to change their domicile to Florida were: (a) In February, 1975, petitioners applied a homestead exemption for the real property purchased in Florida on July 18, 1973; (b) They re-registered their automobile and obtained driving licenses in the State of Florida; (c) Petitioners became members of a club in Florida.

9. The petitioners did not lease their Morrisonville, New York house, but held it for investment. The petitioners continued to own other real estate investments in the Plattsburgh, New York area, such as commercial-type real estate, a multiple dwelling and properties similar to the Morrisonville house (single unit residential real estate). The Morrisonville house was held for investment and was to be sold (property was sold in 1977) when the petitioners deemed that the market was right.

10. Petitioners continued to live in Florida and petitioner Roger P. Kennedy operated the Florida business through May, 1976. The directors of Roger P. Kennedy General Contractors, Inc., determined late in 1975 that because extremely adverse conditions in the construction industry, the company would close up its Florida operation. The company completed its existing

Florida contracts and removed any equipment that it could not sell to Plattsburgh, New York.

11. Due to a severe downtrend in the construction industry, the corporation closed its Florida operation, and petitioners return to New York State and temporarily reestablish their residence in Morrisonville house in June, 1976, which was later sold in 1977.

CONCLUSIONS OF LAW

A. That to change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a new residence in the new locality (Matter of Newcomb, 192 NY 238, 250-251; Matter of Bodfish v. Gallman, 50 A.D.2d 457-458). There is no dispute that petitioners did, in fact, acquired a new residence, the issue is whether they established a new domicile. Intent is measured by whether the place of habitation is the permanent home of petitioners. The question of change of domicile is one of fact, not of law, and "frequently depends on a variety of circumstances, which differ as widely as the peculiarities of individuals". (Matter of Brunner, 41 N.Y.2d 917, 918; Matter of Newcomb, supra, p. 250). A change of residence for even a short time with the intention in good faith to change the domicile is sufficient (Matter of Newcomb, supra, p. 250; Gromel v. Gromel, 22 Misc. 2d 33) even though such person may, at some future time, seek a home elsewhere (McCarthy v. McCarthy, 39 N.Y.S.2d 922).

B. That the acts of the petitioners as of March 1, 1973, when they took up residence with their furniture and belongings in Florida, their actual purchase of a home in Winter Park, Florida, and the pursuit by Roger P. Kennedy of his occupation in construction trade business in Orlando, Florida, confirm their stated intention to make their Florida residence their domicile. That

the petitioners did not dispose of their former residence, but held it as an investment in the same manner as they held other real estate investments, and that the house was used to reestablish their domicile in New York at a later date, does not alter the fact that on March 1, 1973, the petitioners established a new domicile in Florida with good faith intentions.

C. That the income earned after March 1, 1973 from Hammond Lane Mechanicals, Inc. was for consulting service performed via telephone outside New York State, therefore the "place of performance doctrine" is applied in accordance with 1919 Report of Atty. Gen. 301. The "convenience test" is not appropriate since the petitioner performed no personal services whatsoever in New York after the change of domicile, therefore this income is nontaxable to a nonresident.

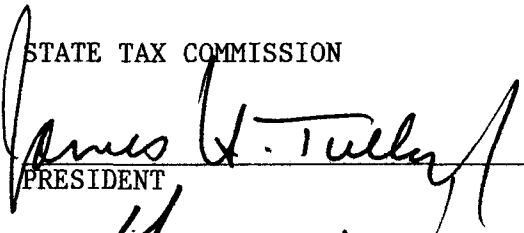
D. That the \$549.00 was paid to New York State, and therefore the petitioners are entitled to claim that amount as New York State withholding tax.

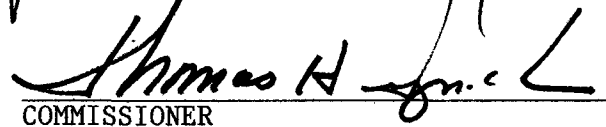
E. That the petition of Roger P. Kennedy and Ann Kennedy is granted to the extent indicated in Conclusions of Law "B", "C" and "D"; therefore, the Audit Division is directed to accordingly modify the Notice of Deficiency issued October 27, 1975 and that except as so granted the petition is in all other respects denied.

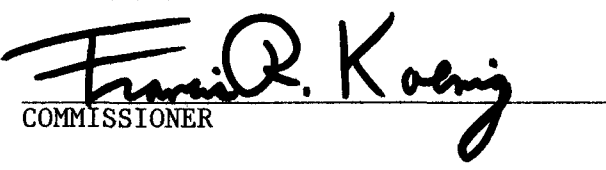
DATED: Albany, New York

JUL 31 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER