

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Harold A. & Edith F. Mercer

:

:

: 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 :  
1970 & 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 15th day of May, 1981, he served the within notice of Decision by certified mail upon Harold A. & Edith F. Mercer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harold A. & Edith F. Mercer  
5066 Forest Rd.  
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  
15th day of May, 1981.

Cornie R. Hagedorn

Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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State of New York  
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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 15th day of May, 1981, he served the within notice of Decision by certified mail upon James M. Wadsworth 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. James M. Wadsworth  
Hodgson, Russ, Andrews, Woods & Goodyear  
1800 One M & T Plaza  
Buffalo, NY 14203

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  
15th day of May, 1981.

Cornie A. Hagelund

J. Vredenburg

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

May 15, 1981

Harold A. & Edith F. Mercer  
5066 Forest Rd.  
Lewiston, NY 14092

Dear Mr. & Mrs. Mercer:

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  
James M. Wadsworth  
Hodgson, Russ, Andrews, Woods & Goodyear  
1800 One M & T Plaza  
Buffalo, NY 14203  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
HAROLD A. MERCER and EDITH F. MERCER	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1970 and 1973.	:	

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Petitioners, Harold A. Mercer and Edith F. Mercer, 5066 Forest Road, 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 years 1970 and 1973 (File Nos. 11748 and 14911).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on October 25, 1977 at 9:15 A.M. Petitioners appeared by James Wadsworth, Esq. The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUE

Whether petitioners were domiciliaries of New York State and liable for New York State income tax as resident individuals.

FINDINGS OF FACT

1. On June 14, 1973, the Income Tax Bureau received a 1970 New York State Income Tax Nonresident Return for 1970, signed by petitioners, Harold A. Mercer and Edith F. Mercer, and dated June 10, 1973. The return stated that petitioners were residents of New York State from January 1, 1970 to January 31, 1970. The return allocated Mr. Mercer's salary income of \$36,543.00, plus dividends of \$635.00 and interest of \$1,116.00, less a loss of \$60.00, for a

total of \$38,234.00, by multiplying said total by a factor of 23/260, which represented the number of days Mr. Mercer claimed to have worked in New York State in 1970 (23) over the number of days which he worked during that year (260). The reported New York State amount was \$3,382.00.

Petitioners' timely filed the following returns for 1973:

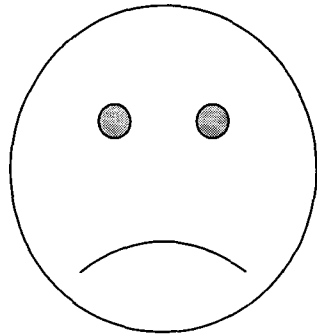
A New York State Income Tax Nonresident Return covering the period January 1 through March 11, 1973, which allocated \$9,079.27 of Mr. Mercer's salary income by multiplying it by a factor of 172/232 which represented the number of days Mr. Mercer claimed to have worked in New York State in 1973 (172) over the number of days he worked during that year (232). This resulted in the figure \$6,731.18, to which was added \$205.62 in dividend income and \$621.02 in interest income less prorated moving expense of \$2,220.93. The New York State amount reported on the nonresident return was \$5,336.89.

A New York State Income Tax Resident Return for the period March 12 through December 31, 1973, which reported \$38,257.92 in Mr. Mercer's salary income, plus dividends of \$866.44 and interest of \$2,616.84, less prorated moving expense of \$9,358.47, for a total of \$32,382.73.

The 1970 return showed no tax due. The 1973 nonresident return claimed a refund of \$444.34, and the 1973 resident return claimed a refund of \$348.24.

2. On October 11, 1974, the Income Tax Bureau issued a Statement of Refund Adjustment which reduced the claimed refunds for 1973 to \$7.74 on the basis that petitioners were residents of New York State for the entire year. A formal denial was sent on May 24, 1976.

**CORRECTION  
FOLLOWS**



8. Petitioners completed complex procedures regarding the transportation of their family dog to England, including six months of quarantine which caused emotional distress in the family; however, petitioners believed that the quarantine was necessary to their permanent move to England.

9. Petitioner Harold A. Mercer states that his intention was to accept a permanent and indefinite work assignment, and to remain in England for the rest of his working days and to possibly retire to Florida. This intention was reinforced following the deaths of his in-laws shortly after petitioners' move to England.

10. Petitioners did not vote in New York from 1970 through 1973.

11. Petitioners' move to England was announced publicly in the media, as well as in company memoranda on various occasions.

12. Petitioners joined various professional and social clubs in England and spent a considerable sum of money purchasing and remodeling their new home in England to suit their needs.

13. Petitioner Harold A. Mercer was present in New York on 22 non-consecutive days during 1970, despite a constant international travel schedule; however, he always returned to England and to his family between such trips.

14. Petitioners maintained a checking account only in New York, which was done as an accommodation to petitioner's employer; however, all other bank accounts were established in England. Petitioners did not maintain any loans or investments in New York while residing in England.

15. Petitioner Harold A. Mercer suffered an unexpected and severe stroke while residing in England, which rendered him incapable of performing his job duties. Based on the prognosis of his physicians, he was transferred back to New York by his employer.

total of \$38,234.00, by multiplying said total by a factor of 23/260, which represented the number of days Mr. Mercer claimed to have worked in New York State in 1970 (23) over the number of days which he worked during that year (260). The reported New York State amount was \$3,382.00.

Petitioners' timely filed the following returns for 1973:

A New York State Income Tax Nonresident Return covering the period January 1 through March 11, 1973, which allocated \$9,079.27 of Mr. Mercer's salary income by multiplying it by a factor of 172/232 which represented the number of days Mr. Mercer claimed to have worked in New York State in 1973 (172) over the number of days he worked during that year (232). This resulted in the figure \$6,731.18, to which was added \$205.62 in dividend income and \$621.02 in interest income less prorated moving expense of \$2,220.93. The New York State amount reported on the nonresident return was \$5,336.89.

A New York State Income Tax Resident Return for the period March 12 through December 31, 1973, which reported \$38,257.92 in Mr. Mercer's salary income, plus dividends of \$866.44 and interest of \$2,616.84, less prorated moving expense of \$9,358.47, for a total of \$32,382.73.

The 1970 return showed no tax due. The 1973 nonresident return claimed a refund of \$444.34, and the 1973 resident return claimed a refund of \$348.24.

2. On October 11, 1974, the Income Tax Bureau issued a Statement of Refund Adjustment which reduced the claimed refunds for 1973 to \$7.74 on the basis that petitioners were residents of New York State for the entire year. A formal denial was sent on May 24, 1976.



3. The Income Tax Bureau recomputed petitioners' 1970 income tax based on total income of \$38,258.00 and imposed a penalty under sections 685(a)(1) and 685(a)(2) for failure to file on or before the prescribed date and to pay the tax due. Accordingly, on November 24, 1975, the Bureau issued a Notice of Deficiency against petitioners for \$3,401.12 in tax, plus \$988.72 in penalty, plus interest.

4. While employed by Airco Alloys, petitioner Harold A. Mercer was promoted to the position of senior vice-president of the International Division, and was directed to establish offices in England in 1969.

5. Petitioners entered into a contract of sale on their home in Lewiston, New York, in December of 1969, despite strong family ties to petitioner Edith F. Mercer's aging parents, who also resided in Lewiston, New York. The home was vacated on January 27, 1970, when petitioners moved into a hotel in Niagara Falls, New York. Closing on said property took place on January 28, 1970.

6. Petitioners discontinued memberships in all social clubs and professional groups to which they belonged. They sold their cars and allowed notary and driver's licenses to expire without renewal. They obtained new driver's licenses in England.

7. Petitioners contracted for and ultimately purchased a new family home in England. They followed extensive procedures regarding enrollment of their children in educational institutions. This was done at great financial expense and resulted in the loss of a full year of class credits for each child, due to the differences in the American and the English educational processes. Furthermore, petitioners' daughter relinquished a scholarship, since petitioner believed that his family no longer qualified as New York residents. Petitioners' new home met the requirements of a range of sentiment, feeling or permanent association normally expected.

16. From 1970 on, petitioners filed tax returns in England. Petitioners' tax withholdings were altered and discontinued in 1970 to reflect his residency in England. Petitioners were treated as residents of England by the Internal Revenue Service.

17. Petitioner Harold A. Mercer obtained a visa for his residency in England, which was directly tied to his renewable, one-year employment contract.

#### CONCLUSIONS OF LAW

A. 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 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; this rule applies even though the individual may have sold or disposed of his former home [20 NYCRR 102.2(d)(2)].

B. That 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. For example, a United States citizen domiciled in New York who goes abroad because of an assignment by his employer or for study, research or recreation, does not lose his New York domicile unless it is clearly shown that he intends to remain abroad permanently and not to return [20 NYCRR 102.2(d)(3)].

Further, in determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct [20 NYCRR 102.2(d)(2)].

C. That the presumption against a change to 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 NY 238,250, 84 N.E. 954).

Petitioners may have left New York State with no intention of returning; however, they failed to show that they went to England intending to remain there permanently or establish a domicile there. Accordingly, petitioners remained domiciled in New York State within the meaning and intent of 20 NYCRR 102.2(d).

D. That any person domiciled in New York is a resident for income tax purposes for a specific taxable year, unless for that year he satisfies all three of the following requirements: (1) he maintains no permanent place of abode in this State during such year, (2) he maintains a permanent place of abode elsewhere during such entire year, and (3) he spends in the aggregate not more than 30 days of the taxable year in this state [20 NYCRR 102.2(b)].

Since the petitioner herein did not satisfy these requirements, for either year, they are deemed to have been full year residents of New York State for both of the years at issue.

E. That penalty for 1970 was improperly imposed under section 685(a)(2) of the Tax Law. Accordingly the Audit Division is directed to recompute penalty solely under section 685(a)(1).

F. That, except as granted above, the petition of Harold A. Mercer and Edith F. Mercer is denied; and the notices of deficiency, together with the Statement of Audit Changes dated November 24, 1975 and the Statement of Refund Adjustment dated October 11, 1974, is sustained.

DATED: Albany, New York  
MAY 15 1981

STATE TAX COMMISSION

*James H. Tully*  
PRESIDENT

*Thomas H. G. C.*  
COMMISSIONER

*Francis R. Koenig*  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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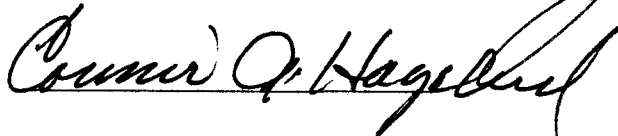
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of June, 1981, he served the within notice of Decision by certified mail upon Harold A. & Edith F. Mercer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

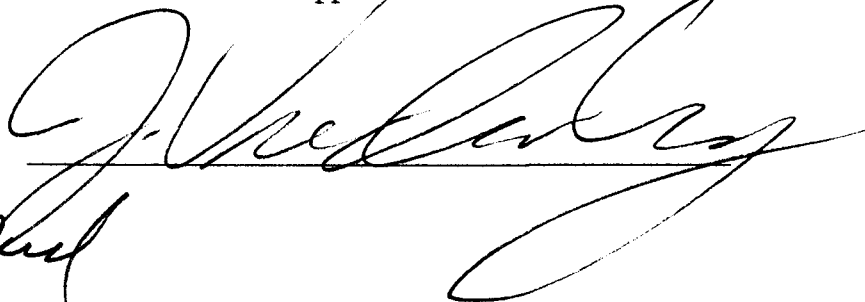
Harold A. & Edith F. Mercer  
138 W. Avon Pkwy..  
Asheville, NC 28804

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Sworn to before me this  
5th day of June, 1981.

  
\_\_\_\_\_  
Commissioner of Taxation and Finance

  
\_\_\_\_\_  
Jay Vredenburg

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

Remailed: June 5, 1981  
~~May 15, 1981~~

Harold A. & Edith F. Mercer  
138 W. Avon Pkwy.  
Asheville, NC 28804

Dear Mr. & Mrs. Mercer:

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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  
James M. Wadsworth  
Hodgson, Russ, Andrews, Woods & Goodyear  
1800 One M & T Plaza  
Buffalo, NY 14203  
Taxing Bureau's Representative

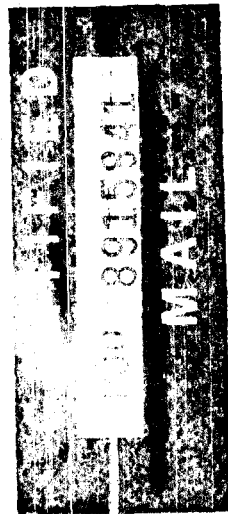
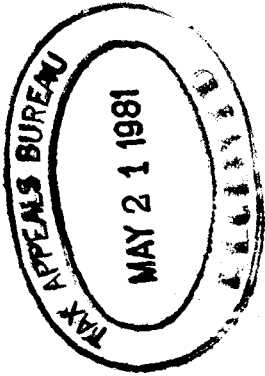
TA 26 (9-79)  
STATE OF NEW YORK  
State Tax Commission  
TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N. Y. 12227



MOVED - NOT FORWARDABLE

Harold A. & Edith F. Mercer

~~5066 Forest Rd.~~  
Lewiston, NY 14082



NATIONAL

SAFETY ARMY WE

*Handwritten signature/initials*

*Handwritten notes:*  
Jenifer  
Bottle  
Address  
5-21-81  
RM