

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
John Bernbach	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1972.	:	

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 16th day of July, 1982, he served the within notice of Decision by certified mail upon John Bernbach, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

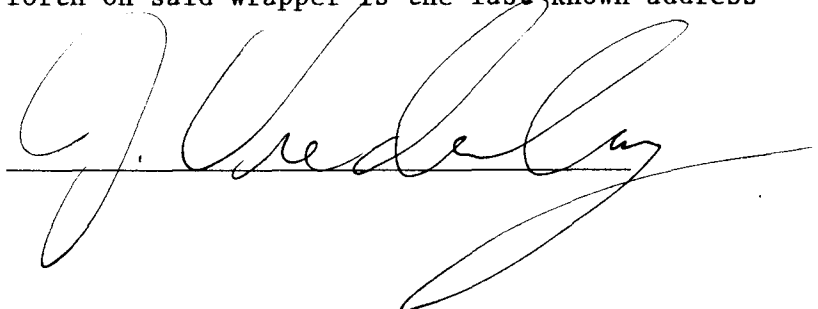
John Bernbach  
23 Chapel St.  
London S.W. 1, ENGLAND

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  
16th day of July, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
John Bernbach :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
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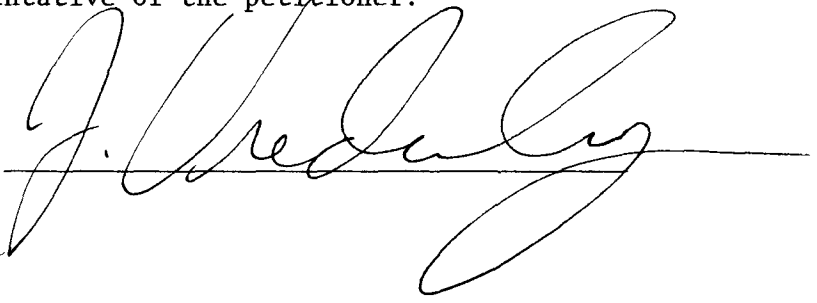
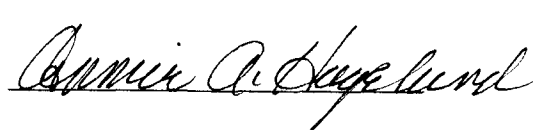
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of July, 1982, he served the within notice of Decision by certified mail upon Arnold B. Panzer the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arnold B. Panzer  
Roberts & Holland  
30 Rockefeller Plaza  
New York, NY 10020

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  
16th day of July, 1982.

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

July 16, 1982

John Bernbach  
23 Chapel St.  
London S.W. 1, ENGLAND

Dear Mr. Bernbach:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Arnold B. Panzer  
Roberts & Holland  
30 Rockefeller Plaza  
New York, NY 10020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
JOHN BERNBACH  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1972.

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DECISION

Petitioner, John Bernbach, 23 Chapel Street, London, S.W.1, England, 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 1972 (File No. 18739).

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 May 31, 1979 at 1:15 P.M. Petitioner appeared by Roberts & Holland, Esqs. (Richard A. Levine, Esq. and Arnold B. Panzer, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Patricia L. Brumbaugh, Esq., of counsel). The formal hearing was continued before the same Hearing Officer, at the same location on February 27, 1981 at 9:30 A.M. Petitioner appeared by the same counsel. The Audit Division appeared by Ralph F. Vecchio, Esq. (Patricia L. Brumbaugh, Esq. of Counsel).

ISSUE

Whether petitioner, John Bernbach, was a domiciliary of New York for the year 1972.

FINDINGS OF FACT

1. On December 28, 1973, petitioner, John Bernbach, filed part-year resident and part-year nonresident New York State income tax returns for the year 1972. Petitioner had previously sought and received permission extending

the time within which to file his 1972 income tax return to December 28, 1973. The part-year resident return covered the period January 1 through May 29, 1972, and the nonresident return covered the remainder of 1972.

2. On December 22, 1976, the Audit Division issued a Notice of Deficiency to petitioner, John Bernbach, asserting a deficiency in the amount of \$100,379.28, plus interest and penalty, for the year 1972. This deficiency was based on a recomputation of petitioner's 1972 New York State income tax as though he was a resident for the entire tax year.

3. Prior to the continuation of the formal hearing on February 27, 1981, petitioner filed an amendment to his petition wherein he amended said petition insofar as it maybe read to imply that he was a domiciliary or resident of New York State at any time during 1972. Petitioner then claimed he was a domiciliary of New Jersey where he lived with his family for a number of years prior to taking up temporary residence in New York in or around September, 1971. He also filed a New York State income tax nonresident amended return for 1972, in which petitioner's New York State personal income tax liability for the year 1972 was recomputed on the basis that petitioner was a nonresident for the entire taxable year. This recomputation resulted in an overpayment for which petitioner now claims a refund.

4. From September, 1969, until September or October, 1971, petitioner resided in a rented apartment with his wife, Robin, and their two infant children at 2 Horizon House, Fort Lee, New Jersey. Petitioner had moved his family from New York City to New Jersey because he thought it would be better for the children to be in the country, and because he personally enjoyed being out of the city and having access to a swimming pool and to tennis courts. Petitioner's Fort Lee apartment was furnished by an interior decorator at a

cost of about \$25,000. His son attended nursery school in New Jersey. Petitioner's cars were registered in New Jersey.

5. Prior to moving to New Jersey, petitioner lived in New York. He was born and raised in New York. His parents and brother are New York residents. There is no evidence that petitioner had any relations living in New Jersey.

6. During the entire period of his residence in New Jersey, petitioner was employed as an account executive with Gilbert Advertising in New York City. He continued to hold this position after his move to New York City in September or October, 1971, and until shortly before his departure for France in May, 1972.

7. Following the birth of petitioner's second child, his wife, Robin, developed increasingly serious emotional problems. Four or five times each week, she found it necessary to see a psychiatrist in Manhattan. Toward the end of 1970, petitioner's wife began to insist that they move from Fort Lee, New Jersey, to Manhattan. She claimed that she felt isolated in New Jersey and wanted to be closer to her psychiatrist who practiced at Park Avenue and 83rd Street. Early in 1971, petitioner's wife found a cooperative apartment at 993 Park Avenue, just a few blocks from her psychiatrist's office. Petitioner reluctantly agreed to the planned move. After consulting with his parents, petitioner purchased the cooperative apartment in Manhattan early in 1971. The purchase was made with funds borrowed from petitioner's father. The shares in the apartment were listed in petitioner's name. Since the apartment would not be available for occupancy until September, 1971, petitioner and his wife continued to live in their Fort Lee apartment for the next several months.

8. In June, 1971, after purchasing the cooperative apartment and while on a business trip to France, petitioner met Jane, his present wife. A British

subject, she lived in France with her two children by a prior marriage. Over the course of the summer, they saw each other in Europe and in New York or were in almost daily communication by telephone. Petitioner alleged that at the time he moved from New Jersey into the Manhattan apartment, in September or October, 1971, he had already resolved to divorce his wife, Robin, and take his children to join Jane in France. However, he did not take any action to accomplish either intention at that time.

9. The cooperative apartment was furnished with furniture from the apartment in New Jersey. About three weeks after moving into the apartment, Robin was admitted to Lenox Hill Hospital. Following this incident, petitioner and his two children moved from the cooperative apartment to live with his brother and sister-in-law in their small apartment in Brooklyn Heights. In November or December, 1971, petitioner consulted a lawyer about filing a suit for divorce. He hoped to obtain a speedy divorce and gain legal custody of the two children so that he could leave for Paris to marry Jane.

10. Since his brother's apartment was too small to accommodate petitioner and his two children, petitioner rented and moved into an apartment of his own located on the same street as his brother's apartment in Brooklyn Heights. This apartment was leased on a month-to-month basis and furnished with second-hand furniture borrowed from various relatives.

11. In February or March of 1972, it became increasingly apparent that petitioner's suit for divorce and custody of the children was not going to be resolved quickly. In fact, it seemed that custody of the two children might well be given to their mother. At that time, petitioner conceived the idea of dealing with his problems in a more dramatic fashion; namely, by carrying his two children off to France.

12. In March, 1972, petitioner requested that Jane start searching for an apartment in Paris large enough to accommodate both their families. She did so, and a lease was entered into for an apartment, commencing April 1, 1972, to run for a term of nine years. Extensive work, lasting many months, was undertaken on the Paris apartment to make it usable. These expenses, paid by petitioner, came to approximately \$50,000. It was also at this time that petitioner started to check on the steps necessary to establish residence in France. He had Jane contact a French lawyer and he consulted with the French consulate. He also spoke with his father (chief executive officer of Doyle Dane Bernbach, Inc.) in reference to his father arranging a job for him with the French subsidiary of Doyle Dane Bernbach, Inc.

13. In May, 1972, petitioner began to suspect that he was being followed by private detectives in New York. Fearing that some action would be taken that would prevent him from removing himself and his children to France, he resigned from Gilbert Advertising, closed his bank accounts in New York and prepared for departure. On May 26, 1972, petitioner, along with his two children, left for France by airplane. He did not return to New York, or to the United States, until 1975 by which time contempt orders outstanding against him had been withdrawn. On arriving in Paris, petitioner immediately took the necessary steps to obtain the legal documents needed to reside and work there. He had his passport stamped by the "Prefecture of Police" in France on June 13, 1972. He also submitted a copy of His "Carte De Sejour De Resident Ordinaire" and "Carte Ordinaire De Travail". Both documents indicated his entry into France as June 9, 1972. In September, 1972, he received his work permit and began to work at the French subsidiary of Doyle Dane Bernbach, Inc.



14. In a letter to the Audit Division dated September 24, 1974, petitioner stated that, "when I left New York State, it was my intention to relinquish my domicile in New York and it was my intention and has been now for more than two years to stay in France". On July 10, 1975, petitioner's accountant stated that it was the taxpayer's intention to relinquish his domicile in New York and change it to France.

#### 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, (1st Dept., 1911).

B. That "[t]he test of intent with respect to a purported new domicile has been stated as 'whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it' (Matter of Bourne, 181 Misc 238,246, aff'd 267 App. Div. 876, aff'd 293 N.Y. 785)." Matter of Bodfish v. Gallman, 50 A.D.2d 457.

C. That Regulations of the State Tax Commission provide:

"A domicile once established continues until the person in question moves to a new location with the intention of making his fixed and permanent home there. No change of domicile results from the removal to a new location if the intention is to remain only for a limited time;... The burden is upon any person asserting a change of domicile to show that the necessary intention existed. 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).

D. That petitioner has not sustained his burden of proof to show that he was a New Jersey domiciliary in 1972. While petitioner was domiciled in New Jersey, his move back to New York cannot be characterized as a temporary move.

Petitioner was born and raised in New York, his relatives lived in New York and he bought a cooperative apartment in New York. There is no showing he had any family ties in New Jersey, he owned no property in New Jersey, and the apartment he lived in with his family was rented. There was no range of sentiment, feeling and permanence associated with New Jersey when he left. His claim that he intended to divorce his wife and move overseas at the time he moved back to New York, is not supported by the evidence. He did not seek legal counsel until a month or two after he returned to New York, and after his wife was admitted to Lenox Hill Hospital. Only when it appeared he would lose custody of his children did he start procedures to move to France. Based on the foregoing, it cannot be stated that his return to New York was to be temporary.


E. That petitioner has not sustained his burden of proof to show that he changed his domicile to France. He did not follow the normal procedure for a person who intended to live and work in France. He did not, at the time of his move into New York, check with the French Consulate about residence in France. He did not seek employment in France until after he learned he could lose custody of his children. The documents (see Finding of Fact #13, supra) he submitted would be required for anyone staying in France beyond three months and he has submitted no evidence that he applied for French nationality after he completed his five-year stay in France. (see Martindale-Hubbell, Law Directory, Vol. V, 1972, French Law Digest). Therefore, petitioner was a domiciliary of New York for the year 1972. (See Shapiro V. State Tax Commission, 50 N.Y.2d 822, rev'g 67 A.D.2d 191).

F. That the petition of John Bernbach is denied; the amended petition and his claim for refund is denied and the Notice of Deficiency dated December 22, 1976 is sustained.

DATED: Albany, New York  
JUL 16 1982

STATE TAX COMMISSION

  
ACTING PRESIDENT

  
COMMISSIONER

  
COMMISSIONER