

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gerson Gurell	:	
and Marsha Gurell	:	AFFIDAVIT OF MAILING
	:	
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of NYS & NYC Income	:	
Tax under Article 22 & 30 of the Tax Law for the	:	
Years 1966 - 1976.	:	

State of New York
County of Albany

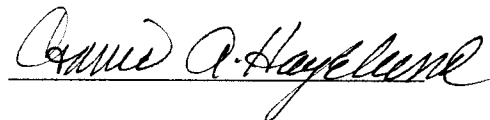
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon Gerson Gurell and Marsha Gurell, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

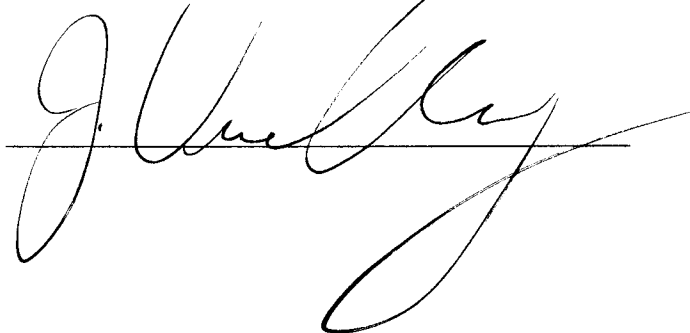
Gerson Gurell
and Marsha Gurell
34 E. Ocean Dr.
Catano, PR 00632

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
4th day of August, 1982.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gerson Gurell	:	
and Marsha Gurell	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of NYS & NYC	:	
Income Tax under Article 22 & 30 of the Tax Law	:	
for the Years 1966 - 1976.	:	

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Elliott Rose the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Elliott Rose
Bernstein, Rose & Co., P.C.
310 Madison Ave.
New York, NY 10017

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
4th day of August, 1982.

Ann O. Daymond

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gerson Gurell	:	
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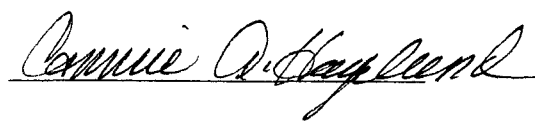
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 4th day of August, 1982, he served the within notice of Decision by certified mail upon Gerson Gurell and Marsha Gurell, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Marsha Gurell
232 E. 26th St.
New York, NY 10010

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
4th day of August, 1982.

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

August 4, 1982

Gerson Gurell
and Marsha Gurell
34 E. Ocean Dr.
Catano, PR 00632

Dear Mr. & Mrs. Gurell:

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 & 1312 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
Elliott Rose
Bernstein, Rose & Co., P.C.
310 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

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

August 4, 1982

Ms. Marsha Gurell
232 E. 26th St.
New York, NY 10010

Dear Ms. Gurell:

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 & 1312 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
Elliott Rose
Bernstein, Rose & Co., P.C.
310 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GERSON GURELL and MARSHA GURELL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles 22 :	:	
and 30 of the Tax Law for the Years 1966	:	
through 1976.	:	

Petitioners, Gerson Gurell and Marsha Gurell, 34 East Ocean Drive, Catano, Puerto Rico 00632, filed a petition for redetermination of a deficiency or for refund of personal income tax under Articles 22 and 30 of the Tax Law for the years 1966 through 1976 (File Nos. 28941 and 28942).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 16, 1981 at 2:45 P.M. Petitioners appeared by Jack Bernstein, CPA, of the accounting firm of Bernstein, Rose & Co., P.C. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioners are domiciliaries of New York State who maintain a permanent place of abode within the State and therefore, taxable as resident individuals.

II. Whether petitioners' income tax liability can be computed on the basis of separate returns.

FINDINGS OF FACT

1. Petitioners, Gerson Gurell and Marsha Gurell, filed joint U.S. Individual Income Tax Returns for the years 1966 through 1975. For the year

1976 petitioners filed separate U.S. Individual Income Tax Returns. Petitioners did not file New York State income tax returns for the years 1966 through 1975. Marsha Gurell filed a separate State and City income tax return for 1976, while Gerson Gurell did not file a State or City return for said year.

2. On April 14, 1978 the Audit Division issued a Notice of Deficiency to petitioners, Gerson Gurell and Marsha Gurell, for the years 1966 through 1975, asserting that New York State personal income tax of \$3,950.36 was due, together with penalties [Tax Law sections 685(a), 685(a)(1) and (a)(2) and 685(b)] and interest. A second Notice of Deficiency was also issued on April 14, 1978 to petitioner Gerson Gurell for the year 1976, asserting that New York State and New York City personal income tax of \$1,416.50 was due, together with penalties [Tax Law sections 685(a)(1) and (a)(2) and 685(b)] and interest.

3. Both of the aforementioned notices of deficiency were based on the results of a field audit conducted by the Audit Division where it was determined that petitioners were taxable as residents of New York State and New York City. The tax due for the years 1966 through 1974 was computed on a joint return basis, while the tax due for 1975 was computed on the basis of separate returns as this method resulted in a lower tax due. Since petitioner Marsha Gurell filed a separate New York State and City income tax return for 1976, her husband's State and City income tax liability for said year was also computed on a separate return basis.

4. Petitioners did not timely file petitions for redetermination of the two deficiency notices dated April 14, 1978. Accordingly, the deficiencies became assessments, subject to collection, on the ninety-first day from the date of the mailing of said notices.

5. In order to obtain an administrative hearing regarding their New York State and New York City income tax liability for the years 1966 through 1976, petitioners, on April 24, 1979, made a partial payment of \$10.00 for each of the eleven years at issue. Accompanying the eleven checks were claims for refund as to each of the eleven years in question. By notice dated August 27, 1979 the Audit Division denied the claims for refund and timely petitions for refund were thereafter submitted by petitioners on September 25, 1979.

6. Petitioners were married in December, 1963 in New York City. Prior to their marriage both petitioners were domiciled within the State of New York. From December, 1963 to approximately December, 1964 petitioners resided in Europe. Upon their return to New York State in 1964 petitioner Gerson Gurell applied for and accepted a teaching position in Puerto Rico. Petitioners moved to Puerto Rico in March, 1965 and Mr. Gurell began working for the Antilles Consolidated School System as a federal employee of the Department of Health, Education and Welfare in August, 1965.

7. Gerson Gurell has worked continuously for the Antilles Consolidated School System in Puerto Rico from 1965 to the present time. From 1965 to 1971 he was hired on a 10-month contract with the summer recess in a non-pay status. Each contract was renewed on an individual basis with no assurance of a contract for the succeeding school year. In June, 1971 the school system converted their employees to excepted service appointments. From June, 1970, petitioner Gerson Gurell has also been continuously employed in the school system's summer school program which began one week after the termination of the regular term and lasted for a total of six weeks.

8. Prior to their marriage, petitioner Marsha Gurell occupied an apartment located at 232 East 26th Street, New York, New York. The apartment has been

continuously rented by Mrs. and/or Mr. Gurell from 1954 to the present time. The evidence presented as to the manner in which said apartment was utilized by petitioners during the years involved herein is unclear and contradictory.

9. On May 19, 1972 the landlord of the apartment located at 232 East 26th Street filed an application with the City of New York, Office of Rent Control, for an order of decontrol, alleging that petitioner Gerson Gurell did not utilize the apartment as his primary residence, but had established a primary residence in Puerto Rico. On June 7, 1972, petitioner Gerson Gurell filed an Answer to Application wherein he indicated:

"I was hired from New York and am given transportation annually to our home in New York City. We spend at least two and one half months in our apartment in New York. We vote by absentee ballot during every election. We are not permanent residents of Puerto Rico, but residents of New York."

The abovementioned statements were affirmed by Gerson Gurell as true of his own knowledge under penalties provided by law.

10. At the hearing held herein, petitioners' representative urged, through unsworn statements, that the declarations made by Mr. Gurell in the Answer to Application were done so solely to allow Mrs. Gurell to keep the apartment. In a letter dated August 8, 1977 petitioner Gerson Gurell averred that, with the exception of 1969 when he spent nine weeks in New York pursuing a master's degree, that he spent approximately two weeks a year in New York City. Neither petitioner appeared at the hearing held herein to offer their oral testimony.

11. Petitioners separated sometime in 1974 and from mid-1974 on, Mrs. Gurell resided in the apartment in New York City while Mr. Gurell remained in Puerto Rico. Although separated, petitioners continued to file joint Federal income tax returns for 1974 and 1975. Separate Federal returns were filed in 1976.

12. Petitioners filed individual income tax returns with the Commonwealth of Puerto Rico for the years 1966 through 1976 paying a tax on the income earned by petitioner Gerson Gurell from the Antilles Consolidated School System.

13. At the hearing held herein, petitioners' representative requested that his clients' income tax liability be recomputed on a separate return pursuant to section 651(b) of the Tax Law. Other than for the years 1975 and 1976, petitioner Marsha Gurell did not earn any income required to be included in gross income.

14. No argument was raised nor was any evidence presented with respect to the penalties asserted pursuant to section 685 of the Tax Law.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30 of the Tax Law.

B. That to change one's domicile there must be an intent to make the new location a fixed and permanent home, coupled with an actual acquisition of a residence in the new locality (Klein v. State Tax Comm., 55 A.D.2d 982, aff'd., 43 N.Y. 2d 812; Bodfish v. Gallman, 50 A.D.2d 457).

C. That while the evidence to establish the requisite intention to effect a change of domicile must be clear and convincing, Klein v. State Tax Comm., supra; Bodfish v. Gallman, supra, the question is not whether the taxpayer intends to leave New York forever, but whether he intends to make the new

location his "permanent home...with the range of sentiment, feeling and permanent association with it." (Starer v. Gallman, 50 A.D.2d 28).

D. That if domicile is established in New York State, there is a basis for taxation therein, and presence in this State is not necessary in order for such tax to be assessed against the taxpayer. Starer v. Gallman, supra.

E. That domicile, whether of origin or selection, continues in existence until another is acquired and the burden of proof rests on the party who alleges a change. Bodfish v. Gallman, supra.

F. That petitioners, Gerson Gurell and Marsha Gurell, have failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that a bona fide intention existed to abandon their New York domicile and establish a new domicile in Puerto Rico during the years 1966 through 1976. That petitioners are taxable as resident individuals of New York State and New York City within the meaning and intent of section 605(a)(1) of the Tax Law.

G. That section 651(b)(2) of the Tax Law provides that:

If the federal income tax liabilities of husband and wife...are determined on a joint federal return, or if neither files a federal return:

(A) they shall file a joint New York income tax return, and their tax liabilities shall be joint and several...or

(B) they may elect to file separate New York income tax returns on a single form if they comply with the requirements of the tax commission in setting forth information, in which event their tax liabilities shall be separate...

H. That since petitioners did not elect to file separate New York income tax returns on a single form, the Audit Division has properly computed their 1966 through 1974 personal income tax liability on the basis of joint returns. Additionally, petitioners have not complied with the provisions of 20 NYCRR 154.4(a) which provides that any change of election from joint returns to

separate returns must be made by the filing of a complete amended return for each year involved. Also, since petitioner Marsha Gurell did not have any taxable income during the years 1966 through 1974, the filing of separate New York State returns for said years would result in an increased liability when compared to joint returns.

I. That since the Audit Division computed petitioners' 1975 New York State income tax liability on the basis of separate returns, their respective tax liabilities for said year shall be separate. For the year 1975, petitioner Gerson Gurell is individually liable for tax due in the amount of \$1,060.67, while petitioner Marsha Gurell is individually liable for tax due of \$80.77. For 1976, petitioner Gerson Gurell is individually liable for New York State and New York City personal income tax due of \$1,416.50. Since petitioner Marsha Gurell filed a separate return for 1976, she is not liable for payment of any of the tax asserted due from her husband for said year.

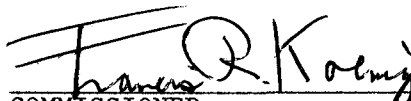
J. That the petitions of Gerson Gurell and Marsha Gurell for redetermination and for refund are granted to the extent indicated in Conclusions of Law "I", supra, and that, except as so granted, the petitions are in all other respects denied.

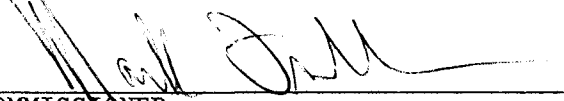
DATED: Albany, New York

AUG 0 4 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER