

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Aleks Kurgvel :
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 :
1966 - 1974. :
AFFIDAVIT OF MAILING

State of New York
County of Albany

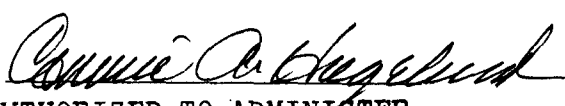
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of September, 1982, he served the within notice of Decision by certified mail upon Aleks Kurgvel, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

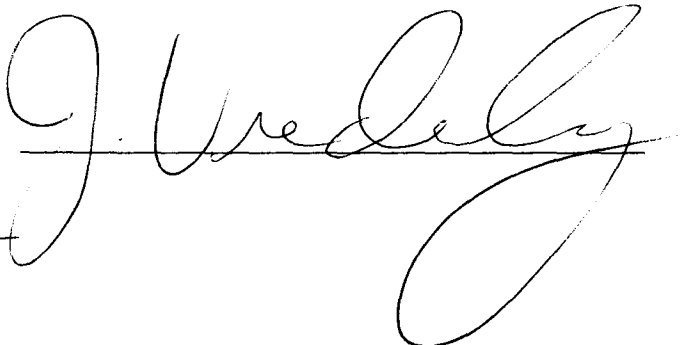
Aleks Kurgvel
4605 90th St.
Elmherst, NY 11373

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
17th day of September, 1982.


AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 1101



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

September 17, 1982

Aleks Kurgvel
4605 90th St.
Elmherst, NY 11373

Dear Mr. Kurgvel:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ALEKS KURGVEL	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1966 through 1974.	:	

Petitioner, Aleks Kurgvel, 4605 90th Street, Elmhurst, New York 11373, 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 1966 through 1974 inclusive (File Nos. 19321 and 21573).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1981 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Kevin Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner was domiciled in, and a resident of, New York State during the years 1966 through 1974.

II. Whether penalties pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law were properly imposed for the year 1972.

FINDINGS OF FACT

1. Petitioner, Aleks Kurgvel, timely filed a separate New York State Income Tax Nonresident Return for the year 1973, whereon he reported no New York taxable income or tax liability. Said return was so filed based on petitioner's contention that he was a resident and domiciliary of Washington, D.C. for the entire period 1966 through September 1974. For taxable year 1974, petitioner

timely filed a separate New York State Income Tax Resident Return in conjunction with a separate New York State Income Tax Nonresident Return and a Schedule for Change of Resident Status, wherein he indicated a change of residence to New York State effective October 1, 1974. For the preceding years at issue, 1966 through 1972, the record shows no indication of petitioner having filed New York State returns, although his wife, Salme E. Kurgvel, did in fact file separate New York State resident returns for such years.

2. On December 28, 1973, the Audit Division issued two statements of audit changes to petitioner wherein he was held to be a domiciliary and resident of New York State for the years 1966 through 1972. Accordingly, two notices of deficiency were issued against petitioner under the same date. One asserted personal income tax of \$1,858.75 for the years 1966, 1967, 1968 and 1969, plus interest of \$556.01, for a total due of \$2,414.76, while the second notice asserted personal income tax of \$1,972.05 for the years 1970, 1971 and 1972, penalties for 1972 of \$217.34, pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law, for failure to file a return and failure to pay the tax determined to be due, respectively, plus interest of \$195.04, for a total due of \$2,384.43.

3. On March 28, 1977, the Audit Division issued a Statement of Audit Changes to petitioner, wherein he was held to be a domiciliary and resident of New York State for the years 1973 and 1974. Accordingly, a Notice of Deficiency was issued in conjunction with said statement asserting personal income tax of \$1,941.27, plus interest of \$391.03, for a total due of \$2,332.30. The deficiencies for all years at issue herein were "based on the decision of the State Tax Commission dated March 5, 1973, for the tax years 1962, 1963, 1964 and 1965", which held petitioner to be domiciled in New York State and subject to New York State personal income tax as resident.

4. On March 24, 1974, petitioner paid, under protest, the full deficiencies, inclusive of penalties and interest, of \$4,799.19 for the years 1966 through 1972.

5. For the years 1966 through 1972, petitioner and his wife filed joint Federal returns, whereon petitioner either listed his address as Washington, D.C. or the body of the return made reference to Washington, D.C. as being his residence. On all such returns, petitioner's wife reported a New York address.

6. Petitioner, Aleks Kurgvel, was born in 1904 in Estonia, a small country on the Baltic Sea in Europe. In 1940, at age thirty-five, he was compelled to flee Estonia as a matter of self-preservation since he was a commissioned officer of the Estonian Armed Forces and, as such, he had refused to secretly collaborate with the occupying Soviet authorities as their spy.

7. During World War II, petitioner worked against the Soviet Union as an intelligence officer for two European armies. Following the war, he and his family became displaced persons in West Germany and lived in temporary camps for displaced persons. Since he had admitted that he had borne arms against the Soviet Union during the war, the United States immigration authorities designated him an undesirable person for immigration purposes. In 1950, he allowed his eldest son, who was eighteen years of age at the time, to accept a college scholarship and immigrate alone to the United States, specifically South Carolina. In 1952, petitioner's wife and minor son were also allowed to immigrate to the United States as the result of petitioner issuing an affidavit consenting to their immigration, recognizing that he may be permanently separated from them. On their arrival into the United States, petitioner's wife and son established residence in Long Island City, New York, where they leased an apartment.

8. In September 1951, while in West Germany, petitioner accepted employment, under contract, with an agency of the United States Government. In February, 1953, petitioner's employer transferred his duty assignment to Washington, D.C. For security reasons, he was prohibited from having his family join him for several years. Petitioner spent a few days with his wife and son in New York on his way to Washington, D.C.

9. On arrival in Washington, D.C., petitioner leased a large furnished room in a private residence owned and occupied by an elderly couple. He was granted use of the bathroom and kitchen facilities on the premises. These accommodations constituted his first permanent home subsequent to his fleeing Estonia and he continued renting the room until his retirement in 1974.

10. On May 13, 1958, petitioner was granted United States citizenship. Prior to such time his wife was granted citizenship.

11. Although the ban against bringing his family to Washington, D.C. had been lifted during the late 1950's, petitioner continued to live apart from his family for financial reasons, since he was striving toward the goal of eventually purchasing a house and it was financially unfeasable for his wife to terminate her employment in New York.

12. In 1963, petitioner and his wife purchased, as tenants by the entirety, a two family home in Elmhurst, New York. Petitioner's wife and youngest son resided in one apartment and leased the other apartment. The apartment his wife and son occupied consisted of two bedrooms, one bathroom, living room and kitchen.

13. During each year at issue, petitioner spent numerous days in New York for the purpose of visiting his family and maintaining the rental property. The number of days petitioner spent in New York during each year at issue was

in excess of thirty but less than one hundred eighty-three. When petitioner did visit his family in New York, petitioner claimed that the only sleeping facility available to him was a couch in the living room.

14. In 1970, petitioner and his wife purchased another house in Lakewood, New Jersey where they intended to reside subsequent to his retirement. The house was situated in an area where a large Estonian contingent resided.

15. Petitioner retired in 1974, and in October 1974 he moved to New York to reside in the Elmhurst house with his wife. Although, at that time, he planned to move into the Lakewood, New Jersey house shortly thereafter, that plan did not materialize. However, petitioner gave no explanation as to why they did not move to New Jersey, and he currently resides with his wife in New York State.

16. Petitioner contended that he was domiciled in, and a resident of, Washington, D.C. not only for the years at issue, but also for the years covered by the adverse decision on which the deficiencies herein were based. He claimed that such prior decision was rendered against him based on facts of his employment which he was prohibited from disclosing at the time. In a letter to the State Tax Commission dated March 24, 1974, he stated, he had consulted with lawyers to learn that technically the decision of the Tax Commission is correct by the letter of the law.

17. Petitioner executed a will in Washington, D.C. during 1964. Additionally, petitioner voted and maintained a checking account in Washington, D.C. during the years in issue. However, he had voted previously in New York, but he allowed his voter registration to be cancelled. He also maintained joint bank accounts in New York and the only interest income reported on his Federal

income tax returns was from New York banks. He had a New York State drivers license which he did not renew.

18. Petitioner has challenged the Tax Commission's prior decision, for the years 1962 through 1965, for a variety of reasons, and argued that such decision is inapplicable to subsequent years due to differences in time frame and circumstances. Petitioner has additionally argued that the State tax authorities have repeatedly caused delays and should be barred from collecting any deficiency as a result of these delays.

19. Petitioner has shown reasonable cause for his failure to file and pay the tax due for 1972.

CONCLUSIONS OF LAW

A. That, in general, a domicile is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent [20 NYCRR 102.2(d)(1)]. In the case of a person domiciled in New York, the maintenance of a permanent place of abode in this State is alone sufficient to make him a resident for tax purposes, even though he remains outside the State for the entire year [20 NYCRR 102.2(e)].

B. That the domicile of a married man is presumed to be at the place where his family resides. This does not mean that a wife may elect the domicile and thereby fix the place of residence of the husband where she and the child may reside. The presumption is applicable only when the husband selects the domicile. But the presumption may be overcome by evidence showing the fact to be otherwise, since it is actual residence coupled with the purpose and intent that it shall be permanent, without regard to the place of residence of the family, which, in the last analysis, fixes domicile. The purchase of a dwelling house in another state is some evidence, although not at all conclusive, of an

intent to acquire a domicile in such state. The location of one's employment is by no means conclusive of domicile. Nor does employment at a particular place bring about a change of domicile where the intention to remain at that place is contingent upon the permanency of the employment. (See 25 Am Jur 2d Domicile, §§ 85, 97 and 98.)

C. That the facts adduced herein show that petitioner, Aleks Kurgvel, intended his domicile to be New York State. His family resided in New York. He and his wife purchased a home in this State. He made numerous visits to New York during the years at issue to visit with his family and to maintain the property. There is insufficient evidence to show petitioner intended Washington, D.C. to be his domicile. He remained in Washington, D.C. for employment purposes. Upon retirement, he came to New York to live with his wife.

D. That the State Tax Commission has considered petitioner's arguments and has found them to be without merit. His arguments mainly concern a challenge of the prior decision. Such a challenge cannot be made at a hearing. Petitioner's only recourse for review of a Commission decision is a judicial review (section 690(b) of the Tax Law). The Commission may consider such facts with relation to the taxes for other years as may be necessary to correctly determine the tax for a taxable year (section 689(g) of the Tax Law). Petitioner has not shown that the facts contained in the prior decision are inapplicable to subsequent years. Petitioner's argument in reference to the Tax Department causing delays is the same as arguing laches. In the Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., (31 A.D.2d 981), it was stated that laches may not be imputed to the State in the absence of statutory authority and this rule is generally applied in connection with tax matters.

E. That penalties imposed under sections 685(a)(1) and (2) of the Tax Law for 1972 are cancelled, since petitioner has shown his failure to file New York State income tax returns and pay the tax due was due to reasonable cause.

F. That the Audit Division is directed to modify the notices of deficiency in accordance with Finding of Fact "4" and Conclusion of Law "E", supra.

G. That the petition of Aleks Kurgvel is granted to the extent indicated and in all other respects denied and the notices of deficiency are sustained as modified by the Audit Division.

DATED: Albany, New York

SEP 17 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER