

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Samuel & Lillian F. Mothner

:

: 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 :
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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Samuel & Lillian F. Mothner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel & Lillian F. Mothner
4905 Woodlands Blvd.
Tamarac, FL 33319

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
26th day of March, 1982.

Ganie A. Hagelund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Samuel & Lillian F. Mothner

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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 26th day of March, 1982, he served the within notice of Decision by certified mail upon Paul Friedman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Friedman
1450 Broadway
New York, NY 10018

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
26th day of March, 1982.

Annie A. Haglund

Jay Vredenburg

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

March 26, 1982

Samuel & Lillian F. Mothner
4905 Woodlands Blvd.
Tamarac, FL 33319

Dear Mr. & Mrs. Mothner:

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
Paul Friedman
1450 Broadway
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SAMUEL MOTHNER and LILLIAN F. MOTHNER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, Samuel Mothner and Lillian F. Mothner, 4905 Woodlands Boulevard, Tamarac, Florida 33319, 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. 13327).

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 17, 1977 at 10:45 A.M. and was continued to conclusion at the same location on June 15, 1977. Petitioner appeared by Paul Friedman, Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners were resident individuals of New York State during the year 1972.

II. If petitioners were nonresident individuals during the year 1972, whether compensation received in 1972 by petitioner Samuel Mothner, while a nonresident, is taxable, in whole or in part, to New York State as compensation paid to him in recognition of services rendered by him for his employer in years prior to 1972 when he was a resident of New York State.

FINDINGS OF FACT

1. Petitioners, Samuel Mothner and Lillian F. Mothner, jointly filed a New York State Income Tax Nonresident Return for 1972, listing their address at that time as 5706 Me La Leuca Drive, Fort Lauderdale, Florida 33313. On the return they reported joint Federal income of \$142,182.26, but stated that total New York income was zero and claimed a refund of \$5,550.48 based on New York State tax withheld by Mr. Mothner's employer.

2. On June 8, 1973, the Income Tax Bureau issued a Statement of Audit Changes against petitioners, Samuel Mothner and Lillian F. Mothner, negating the claimed refund and imposing additional income tax for the year 1972 of \$7,866.77, plus interest on the ground that compensation paid to petitioner Samuel Mothner by his employer in 1972 was fully taxable to New York State as compensation paid to him in recognition of services rendered by him for his employer in years prior to 1972 when he was a resident of New York State. Accordingly, a Notice of Deficiency in the amount of \$7,866.77 plus interest was issued to petitioners on April 11, 1975.

3. Prior to January 1, 1972, petitioners were domiciliaries of the State of New York, residing at either 941 Fairway Lane, Mamaroneck, New York, or 2 Washington Square, New York, New York. Said petitioners also owned a condominium at 400 Hillcrest Drive, Hollywood, Florida.

4. Petitioner Samuel Mothner was an employee of Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill, Lynch"), a stock brokerage firm having a principal place of business in the City and State of New York, at which location said petitioner performed services prior to January 1, 1972 as an executive vice-president and member of the Board of Directors.

5. During 1971, petitioner Samuel Mothner became ill and was advised by his physician that to remain in a cold climate would be detrimental to his health. In or about November, 1971, said petitioner notified Merrill, Lynch that he could not continue living in New York and, subsequently, entered into a verbal agreement with Merrill, Lynch whereby, as of the beginning of 1972, he would perform services as an advisor and consultant to the firm in Florida. This arrangement was not announced until 1972.

6. In or about November, 1971, petitioners, Samuel Mothner and Lillian F. Mothner, left New York and took up residence in Florida at the Hillcrest Drive condominium, where they lived for the remainder of 1971. Simultaneously, in or about November, 1971, said petitioners purchased land upon which a house was to be constructed. The construction was completed in mid-1972, at which time, it became petitioners' residence, being known as 5706 Me La Leuca Drive, Tamarac, Florida.

7. By deed dated January 19, 1972, petitioners also purchased land in Broward County, Florida, upon which a house was ultimately constructed and which became petitioners' residence in or about February, 1977, being known as 4905 Woodlands Boulevard, Tamarac, Florida.

8. In or about January, 1972, pursuant to the advice of the law firm representing Merrill, Lynch in Florida, petitioner Samuel Mothner executed a Declaration of Domicile and Citizenship in the State of Florida, both sworn to by said petitioner and filed in the Official Records Book of Broward County, Florida, on January 4, 1972.

9. In January, 1972, petitioner Samuel Mothner returned to the State of New York for reasons of health and, after undergoing an angiogram, was admitted on or about January 10, 1972 to Mt. Sinai Hospital in the City and State of New

York. After further medical tests, said petitioner underwent a surgical operation, remaining hospitalized for approximately five and one-half weeks. Upon his discharge from Mt. Sinai Hospital, said petitioner lived at 2 Washington Square, New York, New York, a rented apartment which he occupied without a lease and on a month-to-month tenancy, being the same New York address listed by said petitioner on a separate and subsequent Declaration of Domicile and Citizenship sworn to and filed in the Official Records Book of Broward County, Florida, on February 8, 1973.

10. Prior to his return to Florida, and while spending the night in Larchmont, New York, petitioner Samuel Mothner suffered a relapse and was taken by ambulance to New Rochelle Hospital where he remained for approximately two weeks. Upon his discharge, said petitioner again occupied the apartment at 2 Washington Square, returning to Florida at the end of February or in March, 1972.

11. Upon his return to Florida, petitioner Samuel Mothner resided at the home of friends, Mr. and Mrs. Sam Courtney, 5801 Mulberry Drive, Fort Lauderdale, Florida, performing no services for Merrill, Lynch for a period of six weeks. Thereafter, said petitioner commenced work on a part-time basis.

12. In 1972, petitioner Samuel Mothner remained a member of the Board of Directors of Merrill, Lynch and was to function, without assignment to any specific office, as consultant and advisor with respect to that firm's approximately thirty branch offices in Florida. Said petitioner was to act as "troubleshooter", focusing his primary attention on the southeastern part of Florida, investigating complaints made by a customer or regulatory agency against an account executive and filing a report or opinion with Merrill, Lynch. Said petitioner contacted Merrill, Lynch in New York by placing collect

calls from Florida. Said petitioner did not perform services for Merrill, Lynch in the State of New York during 1972.

13. In or about March, 1972, petitioner Samuel Mothner received "incentive compensation" in the amount of \$111,524.00 from Merrill, Lynch. While there was some evidence that such compensation was based on the firm's earnings for 1972 and said petitioner's job performance in 1972, other, more compelling evidence, supports the following propositions: (i) such compensation was computed and paid in March of 1972 (after Merrill, Lynch's books had been closed and audited for the prior fiscal year) based on the firm's earnings in 1971 (the firm's year being on a calendar basis at that time); and (ii) since said petitioner was hospitalized and/or recuperating from one or more hospitalizations during the period January 10, 1972 through the end of March, 1972, and concededly performed no services for Merrill, Lynch during said period, such compensation was in consideration of his performance in 1971. The fact that said petitioner did not receive such compensation in 1973 for his job performance in 1972 does not compel a different conclusion because Merrill, Lynch did not pay incentive compensation in every year and, even in those years when such compensation was awarded, not all executive personnel received it.

14. By interoffice written communication dated May 23, 1972, Merrill, Lynch announced that, effective June 26, 1972, one Edmond N. Moriarity, Jr. was appointed manager of the SD (New York City) office, succeeding petitioner Samuel Mothner, who requested that he be replaced because of ill health; by undated personnel report, received in the payroll department on June 5, 1972, said petitioner's job classification was shown as Office Manager, 70 Pine Street, New York City, Senior Vice President, and Director and, effective June 1, 1972, his address was changed to Florida (c/o Courtney, 5801

Mulberry Drive, Fort Lauderdale, Florida), thereby discontinuing deductions for New York State withholding tax; by personnel report dated July 5, 1972 and approved by the Home Office on July 11, 1972, said petitioner's job classification was shown as Office Manager, 70 Pine Street, New York City, and effective July 1, 1972 (for the balance of the year), his classification was changed to consultant; by letter dated July 17, 1972, Merrill, Lynch noted said petitioner's resignation as a Director of the firm, effective July 11, 1972; said petitioner continued to hold the office of Senior Vice-President on special assignment as a consultant until he retired from Merrill, Lynch in December, 1972.

CONCLUSIONS OF LAW

A. That sections 601 and 611 of the Tax Law impose a tax, inter alia, upon all New York State resident individuals as defined in section 605(a) 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, and the evidence to establish the required intention to effect a change in domicile must be clear and convincing.

Klein v. State Tax Comm., 55 A.D.2d 982, 390 N.Y.S.2d 686 (3rd Dept. 1977), aff'd, 443 N.Y.2d 812, 402 N.Y.S.2d 396 (1977); Bodfish v. Gallman, 50 A.D.2d 457, 378 N.Y.S.2d 138 (3rd Dept. 1976).

C. That the domicile, whether of origin or selection, continues in existence until another is acquired and the burden of proof rests upon the party who alleges a change. Bodfish v. Gallman, 50 A.D.2d 457, 378 N.Y.S.2d 138 (3rd Dept. 1976).

D. That petitioners, Samuel Mothner and Lillian F. Mothner, have failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that they changed domicile from New York to Florida in or before 1972. Their activities in late 1971 and during the period in 1972 when petitioner Samuel Mothner received incentive compensation from Merrill, Lynch, are best described as preparations to effect a change in domicile but do not clearly and conclusively demonstrate that such change occurred. Klein v. State Tax Comm., 55 A.D.2d 982, 390 N.Y.S.2d 686 (3rd Dept. 1977), aff'd; 43 N.Y.2d 812, 402 N.Y.S.2d 396 (1977).

E. That a person domiciled in New York is a resident individual unless: (a) he maintains no permanent place of abode in this State; (b) he maintains a permanent place of abode elsewhere; and (c) spends in the aggregate not more than thirty days of the taxable year in this State (section 605(a)(1) of the Tax Law). Since petitioners did not meet these requirements, they are resident individuals. Accordingly, the compensation in the amount of \$111,524.00 received by petitioner, Samuel Mothner, from Merrill, Lynch in or about March, 1972 is fully taxable to New York State.

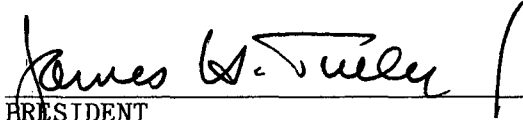
F. That since petitioners were New York State residents in 1972, consideration of Issue "II" is unnecessary.

G. That the petition of Samuel Mothner and Lillian F. Mothner is denied and the Notice of Deficiency issued April 11, 1975 is sustained.


DATED: Albany, New York

MAR 26 1982

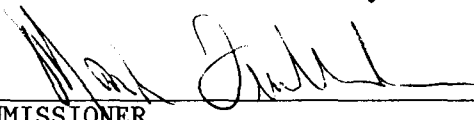
STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER