

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Arthur L. & Melinda Talkington, Jr. :  
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 :  
1976. :

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 4th day of August, 1982, he served the within notice of Decision by certified mail upon Arthur L. & Melinda Talkington, Jr., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Arthur L. & Melinda Talkington, Jr.  
53 Hickory Hill Rd.  
Tappan, NY 10983

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.

*Annie A. Hagelund*

*J. Vredenburg*

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

August 4, 1982

Arthur L. & Melinda Talkington, Jr.  
53 Hickory Hill Rd.  
Tappan, NY 10983

Dear Mr. & Mrs. Talkington:

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

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In the Matter of the Petition  
of  
ARTHUR L. TALKINGTON, JR. and MELINDA TALKINGTON  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1976.

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DECISION

Petitioners, Arthur L. Talkington, Jr. and Melinda Talkington, 53 Hickory Hill Road, Tappan, New York 10983, 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 1976 (File No. 29151).

A small claims hearing was held before Samuel Levy, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 17, 1981 at 2:45 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether petitioner Melinda Talkington was domiciled in, and a resident of the State of New York during the entire year 1976.

II. If it is determined that petitioner Melinda Talkington is domiciled in New York State, then, whether petitioners may file a separate return on a combined form for 1976.

FINDINGS OF FACT

1. On October 4, 1979, the Audit Division issued a Notice of Deficiency against petitioners asserting personal income tax of \$909.48, together with penalties pursuant to section 685, subdivisions (a)(1) and (a)(2) of the Tax

Law, and interest of \$531.86, for a total of \$1,441.34. The Notice of Deficiency was based on information obtained from the Internal Revenue Service; and held that petitioners earnings were subject to New York State personal income tax on the ground that they were domiciliaries of New York State and that they failed to submit information requested in correspondence sent them by the Audit Division.

2. On December 31, 1979, petitioner Arthur L. Talkington, Jr. filed a separate New York State Income Tax Resident Return for 1976 on which he paid personal income tax of \$17.02, penalties of \$6.13 and interest of \$3.90, for a total of \$27.05. Petitioners were not given credit for said payment on the Notice of Deficiency.

3. On August 28, 1980, a pre-hearing conference was held wherein the petitioners were allowed additional credit for previously disallowed itemized deductions. Based on said allowance, the tax liability was recomputed as follows: personal income tax, \$605.32, section 685(a)(1) penalty of \$136.20 and section 685(a)(2) penalty of \$127.12, for a total of \$868.64 plus accrued interest.

4. At the hearing, petitioner Arthur L. Talkington, Jr. contended that he and his wife separated, without judicial decree, sometime in 1975, and that she maintained a separate residence without New York State. He also contended that the residence which she occupied was furnished by her employer, for whom she had been employed several years prior to their separation.

5. Alternatively, Petitioner Arthur L. Talkington, Jr. argued that if his wife is deemed to be a New York domiciliary that he is permitted to file a separate amended return on a combined form for the subject year. At the hearing, petitioner Arthur L. Talkington, Jr. submitted an unsigned New York

State Income Tax Resident Return on which he and his wife computed their tax separately for 1976.

6. For 1976 petitioners filed a joint Federal income tax return on which they showed their home address as 53 Hickory Hill Road, Tappan, New York. The property at said address, is jointly owned by petitioners.

7. On at least one occasion after July 1975, petitioner Melinda Talkington voted in New York State.

8. Petitioner Melinda Talkington registered her automobile in New York State for 1976.

#### CONCLUSIONS OF LAW

A. That petitioner Melinda Talkington failed to sustain the burden of proof required under section 689(e) of the Tax Law to show that she was not domiciled in New York State for 1976 in accordance with the meaning and intent of section 605(a) of the Tax Law. That the burden is upon any person asserting a change of domicile to show that the necessary intention to change such domicile existed (20 NYCRR 102.2(d)(2) and section 689(e) of the Tax Law). That petitioner Melinda Talkington retained her jointly-owned interest in the family home in New York State; that her personal automobile was registered in New York State and she voted in New York State.

B. That petitioner Melinda Talkington was domiciled in and a resident of New York State for the entire year 1976 in accordance with the meaning and intent of section 605(a) of the Tax Law and 20 NYCRR 102.2.

C. That a change of election must be made by filing a complete amended return for subject year, properly signed by each taxpayer who made or agreed to the original election [20 NYCRR 154.4(a)]. The petitioners failed to file

a complete amended return for subject year which was properly signed by each taxpayer who made or agreed to the election.

D. That the Audit Division is hereby directed to modify the Notice of Deficiency dated October 4, 1979, to be consistent with Findings of Fact "2" and "3" determined hereto; and that, except as so granted, the petition is in all other respects denied. The Notice of Deficiency, as hereby modified, is sustained, together with such penalties and interest as may be lawfully due and owing.

DATED: Albany, New York

AUG 04 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER