

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

David L. & Marilyn S. Wenner

:

:

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 and Nonresident:  
Earnings Tax under Chapter 46, Title U of the :  
Administrative Code of the City of New York for :  
the Year 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 14th day of December, 1982, he served the within notice of Decision by certified mail upon David L. & Marilyn S. Wenner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David L. & Marilyn S. Wenner  
c/o Robert G. Stern, Arthur Andersen & Co.  
1345 Avenue of the Americas  
New York, NY 10019

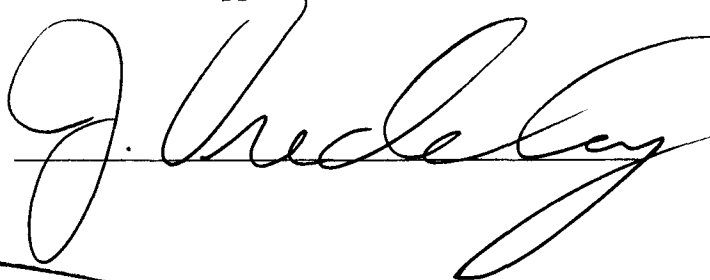
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
14th day of December, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
David L. & Marilyn S. Wenner : 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 and Nonresident :  
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Administrative Code of the City of New York for :  
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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 14th day of December, 1982, he served the within notice of Decision by certified mail upon Robert G. Stern the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

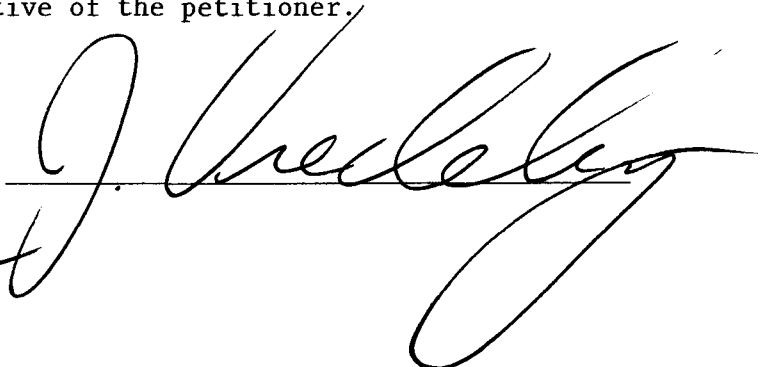
Robert G. Stern  
Arthur Anderson & Co.  
1345 Avenue of the Americas  
New York, NY 10019

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  
14th day of December, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



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

December 14, 1982

David L. & Marilyn S. Wenner  
c/o Robert G. Stern, Arthur Andersen & Co.  
1345 Avenue of the Americas  
New York, NY 10019

Dear Mr. & Mrs. Wenner:

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  
Robert G. Stern  
Arthur Andersen & Co.  
1345 Avenue of the Americas  
New York, NY 10019  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
DAVID L. WENNER and MARILYN S. WENNER  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article  
22 of the Tax Law and Nonresident Earnings Tax  
under Chapter 46, Title U of the Administrative  
Code of the City of New York for the Year 1976.

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DECISION

Petitioners, David L. Wenner and Marilyn S. Wenner, c/o Robert G. Stern, Arthur Andersen & Co., 1345 Avenue of the Americas, New York, New York 10019, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File No. 28235).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 19, 1982 at 9:30 A.M. Petitioner appeared by Arthur Andersen & Co. (Sol Upbin, CPA). The Audit Division appeared by Paul B. Coburn, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioners were resident individuals of New York State during any part of the year 1976.

II. Whether, in the event petitioners were resident individuals during 1976, they effected a change of domicile from New York to Denmark in 1976.

III. Whether petitioners are subject to the imposition of the New York City Earnings Tax on Nonresidents for the year 1976.

FINDINGS OF FACT

1. On October 17, 1977, petitioners, David L. Wenner and Marilyn S. Wenner, husband and wife, filed a New York State Income Tax Resident Return (Form IT-201/208) and a New York State Income Tax Nonresident Return (Form IT-203/209) for the year 1976. Included as part of this filing was a Schedule for Change of Resident Status (Form CR-60.1), on which petitioners indicated they were residents of New York in 1976 only until February 28, and were nonresidents for the remaining ten months of that year. Petitioners listed their last permanent address in the United States as 467 Highbrook Avenue, Pelham Manor, New York. Pelham Manor is located in Westchester County, New York.

2. On August 9, 1979, the Audit Division issued to petitioners a Notice of Deficiency asserting additional tax due for 1976 in the amount of \$5,086.33 plus interest.

3. A Statement of Audit Changes, also dated August 9, 1979, explained that the asserted deficiency was based on a recomputation of petitioners' 1976 tax liability reflecting the Audit Division's disallowance of petitioners' claimed change of residence out of New York in 1976.

4. Petitioner David L. Wenner is now and was during the year 1976 employed by McKinsey and Company, Inc. ("McKinsey"), a business and management consulting firm with offices located in various cities in the United States and several foreign countries. Mr. Wenner had joined McKinsey in 1973.

5. Prior to joining McKinsey in 1973, Mr. Wenner, a native of Florida, had been employed by Texas Instruments Corporation in the Boston, Massachusetts area and also by a consulting firm located in Massachusetts.

6. Upon accepting employment with McKinsey in 1973, Mr. Wenner was assigned to the firm's New York City office. (McKinsey had no office in Boston, Massachusetts in 1973.) Neither his employment with McKinsey nor his assignment to McKinsey's New York City office was in any way limited in duration to a specified period of time. Petitioners moved to New York and purchased a home in May of 1973. Presumably this home was located at the Pelham Manor address listed above (see Finding of Fact "1").

7. According to testimony by one Marvin E. Lesser, a senior vice-president with McKinsey, it is the policy of McKinsey to encourage their personnel to move to different office locations within the company. McKinsey generally places no time limit on the duration of an employee's assignment to a particular office and views employee mobility as a positive factor in the employee's career progression with McKinsey.

8. In the latter part of 1975, Mr. Wenner advised McKinsey's New York office that he wished to leave the company. Prior to this, Mr. Wenner had been taking job interviews in the southeastern United States, specifically in Jacksonville, Florida and in Atlanta, Georgia.

9. In response to Mr. Wenner's statement and as an inducement for him to remain with the company, McKinsey offered Mr. Wenner an assignment with their office in Copenhagen, Denmark. Mr. Wenner accepted this assignment and, after putting their house on the market for sale, petitioners left New York for Copenhagen in late February of 1976. Petitioners sold their house in June of 1976. Mr. Wenner's assignment to Copenhagen was not limited in duration to any specified period of time, but was originally stated to be for "one study", meaning one particular project or problem to be analyzed and hopefully solved by Mr. Wenner.

10. Petitioners remained in Denmark for three years, during which time Mr. Wenner was elected a member of McKinsey's worldwide management group. During 1979, McKinsey agreed to Mr. Wenner's request to be transferred to McKinsey's then newly opened Atlanta, Georgia office. Petitioners moved from Denmark to Atlanta, Georgia, and Mr. Wenner commenced work at McKinsey's office there in 1979.

11. Prior to and at the time of petitioners' move from New York to Denmark, McKinsey did not have an office in Atlanta, Georgia, nor were there definite plans, at that time, to open an office in Atlanta.

#### CONCLUSIONS OF LAW

A. That section 605(a) of the Tax Law in pertinent part provides:

"(a) Resident Individual. A resident individual means an individual:

(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state,..."

B. That when petitioners moved from Massachusetts to New York at the time of petitioner David Wenner's acceptance of employment with McKinsey in 1973, and with their purchase of a home in New York at that time, petitioners effected a change of residence and established their domicile in New York. Petitioners have not provided sufficient credible evidence as would sustain the burden of proving that they were domiciliaries of and intended their permanent place of residence in 1976 to be either Massachusetts or any state other than New York.

C. That regulations of the State Tax Commission in pertinent part provide:

"a United States citizen will not ordinarily be deemed to have changed his domicile by going to a foreign country unless it is clearly shown that he intends to remain there permanently. For example, a United States citizen domiciled in New York, who goes abroad because of an assignment by his employer..., does not lose his

New York domicile unless it is clearly shown that he intends to remain abroad permanently and not to return." [20 NYCRR 102.2(d)(3)].

D. That petitioners did not effect a change of domicile from New York to Denmark in 1976, inasmuch as their move to Denmark was the result of an assignment by petitioner David Wenner's employer and their stay in Denmark was not intended to be of a permanent nature. Accordingly, since petitioners were domiciliaries of New York and did not effect a change of domicile out of New York in 1976, they are taxable as resident individuals of New York for that year.

E. That petitioners were not domiciliaries of New York City nor did they maintain a permanent place of abode there in 1976, but rather they were domiciliaries and residents of Westchester County, New York in 1976. However, petitioner David L. Wenner did earn wages as the result of his work for McKinsey in New York City in 1976. Accordingly, petitioners, as nonresidents of New York City who had wage earnings from working in New York City, are subject to the New York City Earnings Tax on Nonresidents within the meaning and intent of sections U 46-1.0(h)(1) and (2), U 46-1.0(i) and U 46-2.0(a)(2) of Title U of the Administrative Code of the City of New York.

F. That the petition of David L. Wenner and Marilyn S. Wenner is hereby denied and the Notice of Deficiency issued August 9, 1979, together with such interest as may be lawfully owing, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 14 1982

*Robert J. Barba*  
ACTING PRESIDENT

*Francis R. Koehn*  
COMMISSIONER

*Mark J. [Signature]*  
COMMISSIONER