

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph W. & Joetta A. Bernhard :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1977 - 1978. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York }  
ss.:  
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Joseph W. & Joetta A. Bernhard, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph W. & Joetta A. Bernhard  
6415 Edgewood Dr.  
Rome, NY 13440

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
20th day of December, 1983.

David Parchuck

Ann M. O'Connell  
pursuant to Tax Law section 174

Authorized to administer oaths

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Joseph W. & Joetta A. Bernhard :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1977 - 1978. :

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 20th day of December, 1983, he served the within notice of Decision by certified mail upon Philip J. Sanzone, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip J. Sanzone  
O'Shea, Griffin, McDonald, Hurd & Stevens  
107 West Liberty St., Box 4310  
Rome, NY 13440

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
20th day of December, 1983.

David Paschuck

James A. Hargrave  
pursuant to Tax Law section 174

Authorized to administer oaths

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

December 20, 1983

Joseph W. & Joetta A. Bernhard  
6415 Edgewood Dr.  
Rome, NY 13440

Dear Mr. & Mrs. Bernhard:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Philip J. Sanzone  
O'Shea, Griffin, McDonald, Hurd & Stevens  
107 West Liberty St., Box 4310  
Rome, NY 13440  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JOSEPH W. AND JOETTA A. BERNHARD : DECISION  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article :  
22 of the Tax Law for the Years 1977 and 1978. :

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Petitioners, Joseph W. Bernhard and Joetta A. Bernhard, 6415 Edgewood Drive, Rome, New York 13440, 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 1977 and 1978. (File No. 31480).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on March 7, 1983 at 2:45 P.M. with all briefs to be submitted by March 31, 1983. Petitioners appeared by Philip J. Sanzone, Esq. The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner Joetta A. Bernhard's marriage to a New York resident while she was on active duty in the armed services changed her domicile from Pennsylvania to New York.

FINDINGS OF FACT

1. Petitioners, Joseph W. Bernhard and Joetta A. Bernhard filed separate New York State income tax resident returns on combined Form IT-201/208 for the years 1977 and 1978. Petitioner Joetta A. Bernhard excluded from total New York income, the income she received for active service in the Armed Forces of the United States. She filed a Schedule for Change of Resident Status with the

1978 return indicating she was a resident of New York for the period July, 1978 through December, 1978 and reported non military income earned for that year.

2. On May 27, 1980, the Audit Division issued a Notice of Deficiency to petitioners asserting additional tax due from Joetta A. Bernhard of \$895.37 and \$618.09 for 1977 and 1978, respectively and from Joseph W. Bernhard of \$17.50 for 1978, plus interest of \$227.74. Said deficiency was reduced by the overpayment of \$218.80 claimed on petitioners' 1978 return. The aforementioned Notice of Deficiency was premised on an explanatory Statement of Audit Changes, also dated May 27, 1980, wherein the Audit Division held Joetta A. Bernhard to be a domiciliary of New York State and taxable as a resident individual. Accordingly, the wage income received from the United States Air Force which was excluded from New York income was deemed taxable. In addition, the household credit claimed for 1978 was disallowed as petitioners' combined total income exceeded \$25,000.00. The disallowance of the household credit is not at issue.

3. Petitioner Joetta A. Bernhard at the time of her entry into the United States Air Force resided in Monongahela, Pennsylvania. Throughout her Air Force career she used the Pennsylvania address (the home of her parents) as her permanent place of residence for all purposes. In July, 1974 she received orders directing her to report at Griffiss Air Force Base in Rome, New York as her official duty station. She resided in Rome, New York at 419 North George Street. While residing in Rome, New York, she met petitioner Joseph W. Bernhard (a civilian and a New York domiciliary) and subsequently married him on July 24, 1976. The ceremony took place in her home town in Pennsylvania. They resided at the 419 North George Street address until September 30, 1976, at which time they moved to 8642 Elmer Hill Road, Rome, New York. On July 11, 1978, Joetta A. Bernhard resigned her commission as captain in the Air Force and became a

civilian employee. Petitioners remained in New York State and in July, 1980 purchased a home at 6415 Edgewood Drive, Rome, New York.

4. The entire time Joetta A. Bernhard was on active duty, she voted by absentee ballot in Pennsylvania, held a Pennsylvania driver's license, filed Pennsylvania income tax returns and used Monongahela, Pennsylvania as her permanent residence for official Air Force records. After her marriage, but prior to her separation from the Air Force, Joetta A. Bernhard had a will prepared which was to be interpreted under the laws of Pennsylvania.

Upon her resignation from the Air Force, Joetta A. Bernhard obtained a New York driver's license, changed her address on Air Force records to reflect New York State as her permanent home of record, registered to vote in New York and commenced paying New York State income taxes as a resident individual.

5. Prior to their marriage, petitioners agreed that Joseph W. Bernhard would accompany Joetta A. Bernhard if and when the Air Force ordered a change in her duty station.

6. The Audit Division's assertion that petitioner Joetta A. Bernhard was a domiciliary of New York State and taxable as a full year resident individual for the years 1977 and 1978 was based solely on her marriage to an individual who was domiciled in New York State.

#### CONCLUSIONS OF LAW

A. That section 605(a) of the Tax Law defines resident individual as one:

"(1) who is domiciled in this state...

\* \* \*

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States." (emphasis supplied)

B. That a domicile, in general, 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)].

C. That a domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. The burden is upon any person asserting a change of domicile to show that the necessary intention existed [20 NYCRR 102.2(d)(2)].

D. That while regulation 20 NYCRR 102.2(d)(6) was adopted by the State Tax Commission after the period at issue herein, it is, in effect, a codification of the policy of the Commission during the period in issue. Said regulation states:

"(6) Federal law provides in effect that for the purposes of taxation, a serviceman is not deemed to have lost his residence or domicile in any state solely by reason of being absent therefrom in compliance with military or naval orders. Thus, such Federal law insures that a serviceman domiciled in New York State would not be deemed a domiciliary for income tax purposes in another state in which he is stationed. On the other hand, a serviceman domiciled in another state who is stationed in New York State would not be deemed a domiciliary, for personal income tax purposes, of New York State. The rule is, generally speaking, that the domicile of a person is in no way affected by service in the armed forces of his country. A change of domicile has to be shown by facts which objectively manifest a voluntary intention to make the new location a domicile. It is possible for a serviceman to change his domicile; however, the requisite intent is difficult to prove." (20 NYCRR 102.2(d)(6), effective January 28, 1982).

E. That ordinarily a wife's domicile follows that of her husband's [20 NYCRR 102.2(d)(5)].

F. That petitioner Joetta A. Bernhard was a domiciliary of Pennsylvania when she entered the military service. Although her marriage would ordinarily effect an immediate change of domicile to that of her husband, the factual circumstances herein establish otherwise. Joetta A. Bernhard never intended to make New York State her permanent home until she resigned her commission in the


United States Air Force on July 11, 1978. Accordingly, petitioner Joetta A. Bernhard was not taxable as a resident individual until such time within the meaning and intent of section 605(a) of the Tax Law and 20 NYCRR 102.2(a).

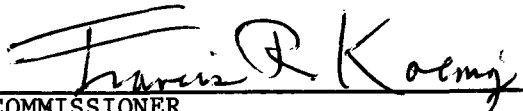
G. That the petition of Joseph W. Bernhard and Joetta A. Bernhard is granted. The Audit Division is directed to recompute petitioners tax for the years in issue and to authorize any refund that may be due.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 20 1983

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER