

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Stewart A. Brazin : 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 :
1975.

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Stewart A. Brazin, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stewart A. Brazin
60 Pembroke Ave., Apt. 1213
Norfolk, VA 23708

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
24th day of January, 1983.

Kathy Pfaffenbach

Gerrit J. Skelton

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Stewart A. Brazin
60 Pembroke Ave., Apt. 1213
Norfolk, VA 23708

Dear Mr. Brazin:

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	:	
	:	
STEWART A. BRAZIN	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1975.	:	

Petitioner, Stewart A. Brazin, 601 Pembroke Avenue, Apt. 1213, Norfolk, Virginia 23507, 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 1975 (File No. 21009).

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 February 8, 1980 at 10:00 A.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

ISSUE

Whether petitioner was a resident individual of New York State during the year 1975.

FINDINGS OF FACT

1. Petitioner, Stewart A. Brazin, timely filed a New York State Income Tax Resident Return for the year 1975 whereon he reported his "mailing address" as 30 Valley Lane East, Valley Stream, New York 11581.

2. On December 23, 1976, petitioner filed a Claim For Credit or Refund of Personal Income Tax, Form IT-113X, wherein he requested full refund of \$1,205.54, said amount representing the balance due which was computed on and

paid with his return. Petitioner's basis for said claim was his contention that he was not a resident individual of New York State during 1975 since he had satisfied the requirements provided under section 605(a)(1) of the Tax Law.

3. On July 8, 1977, the Audit Division issued a Notice of Disallowance of petitioner's claim for refund. Said disallowance was explained in a letter subsequently issued to petitioner on September 6, 1977, which reads in pertinent part that:

"Under the policy of the New York State Tax Law, concerning residents who are serving in the armed services, you do not meet the second requirement of maintaining a permanent place of abode outside New York State for the entire year, since you lived in Government quarters which are considered to be maintained by the United States Government rather than by the individual serviceman."

4. Petitioner argued that his living at the Bachelor Officer Quarters during the entire year 1975 constituted the maintenance of a permanent place of abode without New York State.

5. Petitioner, Stewart A. Brazin, enlisted in the United States Navy during 1974. He was commissioned an officer in the Medical Corps of the United States Naval Reserve and reported to active duty from 30 Valley Lane East, Valley Stream, New York, on or about July 7, 1974. At that time petitioner, in compliance with permanent change of station orders, reported to the Commander Naval Amphibious Forces - Pacific, located at the Naval Amphibious Base, Coronado, California. Petitioner remained at this duty station throughout taxable year 1975.

6. On reporting to said duty station, petitioner, a single individual, was advised that naval regulations required that an officer holding the rank of lieutenant, as did petitioner, had the option of either living on base at the Bachelor Officer Quarters (BOQ) or off base at his own expense. Based on financial considerations, petitioner opted to live at the BOQ and did so throughout taxable year 1975 in quarters assigned to him which consisted of

one room, which served as a bedroom and living room, plus a private bathroom.

7. Petitioner submitted the following documentation which he purported serves as indicia of the permanent nature of his quarters:

(a) A 1975 telephone bill and credit card from Pacific Telephone, evidencing a private phone maintained by petitioner in his quarters.

(b) An automobile insurance policy dated February 25, 1975, issued by United Services Automobile Association to petitioner at his California naval address.

(c) A California medical license issued to petitioner on December 6, 1974.

(d) A statement from Security Pacific National Bank, Coronado, California Branch, for the period March 24, 1975 through April 7, 1975, indicating maintenance of a checking account by petitioner, and

(e) A certificate and letter of appreciation dated June 18, 1975 from the Boy Scouts of America, thanking petitioner for voluntary services rendered on April 29, 1975, when he provided free medical examinations to eighteen scouts of Troop 6, El Cajon, California.

8. Petitioner continuously resided at the BOQ in Coronado, California, until July 1, 1976, at which time his duty station was changed.

9. Petitioner spent in the aggregate twenty-four days of taxable year 1975 in New York State.

10. Petitioner, who readily conceded that he was domiciled in New York State during 1975, maintained no permanent place of abode in New York during said year. The mailing address listed on his return was the home of his parents and a room was not maintained for petitioner at such address, subsequent to his entering military service.

CONCLUSIONS OF LAW

A. That section 605(a)(1) of the Tax Law provides that:

"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."

Since petitioner, an admitted domiciliary of New York State during taxable year 1975, has satisfied two of the three requirements necessary for nonresident status (Findings of Fact "9" and "10" supra), the issue in the instant case rests on whether petitioner has additionally met the requirement that he maintained a permanent place of abode elsewhere during such year. Petitioner argued that his living in the Bachelor Officer Quarters in Coronado, California constituted such maintenance of a permanent place of abode elsewhere. Alternatively, the Audit Division took the position that this requirement was not met by petitioner since the Bachelor Officer Quarters "are considered to be maintained by the United States Government rather than by the individual serviceman."

B. That in order to determine whether petitioner maintained a permanent place of abode elsewhere during the taxable year at issue, one must first determine whether such place of abode was permanent (emphasis supplied).

In an Opinion of Attorney-General dated March 28, 1940, it was stated that:

If one were to give the fullest effect to the word "permanent" then a person maintaining a "permanent place of abode" in New York should be considered as a domiciliary. But careful study of the language of Article 16, section 350(7) (superceded by, and essentially identical to Article 22, section 605(a)(1) of the Tax Law) compels the conclusion that the Legislature did not intend that the word "permanent" should be construed as meaning the ultimate in the way of a residence established for all time to come. Obviously it intended rather an abiding place, established either by a domiciliary or a nondomiciliary, having a fixed or established character as distinguished from intermittent or transitory.

In the Matter of Richard W. LaVigne v. State Tax Commission, 38 A.D.2d 773, the issue raised was identical to that in the instant case, namely, whether a serviceman domiciled in New York but living on a military base outside the State is able to maintain(s) a permanent place of abode elsewhere within the meaning of subdivision (a)(1) of section 605 of the Tax Law.

In this case the Supreme Court, Appellate Division held that "the determination of a permanent place of abode outside the State should not depend merely upon whether petitioners lived on or off the military base". Additionally, it held that it should be determined "whether other factors do or do not establish that petitioners had a permanent place of abode outside the State".

In The Matter of Flather v. Norberg, 377 A.2d 225, the Supreme Court of Rhode Island (where section 44-30-5(a)(1) is identical in language to section 605(a)(1) of the Tax Law of New York State) held that:

In determining whether individual has established "permanent place of abode" in another state for purposes of determining personal income tax liability, establishment of permanent place of abode requires maintenance of fixed place of abode over significant period of time to create well-settled physical connection with given locality.

In the instant case, petitioner was assigned to the Naval Amphibious Base in Coronado, California under permanent change of station orders. He remained at such duty station for approximately two years and lived in the Bachelor Officer Quarters at his discretion for the full duration of his assignment. The evidence submitted (Finding of Fact "7") leads to the inference that petitioner's Bachelor Officer Quarters did in fact constitute a fixed place of abode which was maintained over a sufficiently significant period of time to create a well-settled physical connection with that geographical area.

C. That in order to determine whether petitioner maintained a permanent place of abode elsewhere during taxable year 1975, proper construction of the

word "maintain" must be ascertained.

In an opinion of counsel dated July 24, 1941 it was stated that:

The word "maintain", as used in said statutory definition, means 'to keep effective' and that said definition refers to any permanent place of abode occupied or kept effective by the taxpayer.

Further, it is stated in said opinion of counsel that:

Whether such taxpayer contributes to the cost of upkeep of such place of abode is merely an evidentiary factor to be considered in determining the question of residence.

In the Matter of Rothfeld v. Graves, 264 App. Div. 54, where a claim for refund was denied after an informal hearing on the ground that maintenance by someone else of a place of abode, in which an incompetant domiciliary of the State of New York is cared for, was not sufficient compliance with the statute to relieve the petitioner from taxation, the court held that:

It is certain that Alfred Rothfeld was domiciled in the State of New York where his committee was appointed and where they lived. It is also clear that he maintains no permanent place of abode within the State but there is maintained for him (emphasis supplied) a permanent place of abode without the State and that he does not spend in the aggregate thirty days of a taxable year within the State.

He is entitled to the exemption that he claims and the determination under review should be annulled.

Stewart A. Brazin, the petitioner herein, has demonstrated that the Bachelor Officer Quarters in which he lived during 1975 were "kept effective" and "occupied" by him during the entire taxable year. Whether the United States Government or the petitioner paid for the upkeep of the quarters is immaterial as long as said quarters were maintained either by or for him.

D. That petitioner's Bachelor Officer Quarters constituted a permanent place of abode which was maintained during the entire taxable year 1975.

E. That petitioner, Stewart A. Brazin, was not a resident individual of New York State during taxable year 1975 within the meaning and intent of

section 605(a)(1) of the Tax Law.

F. That the petition of Stewart A. Brazin is granted.

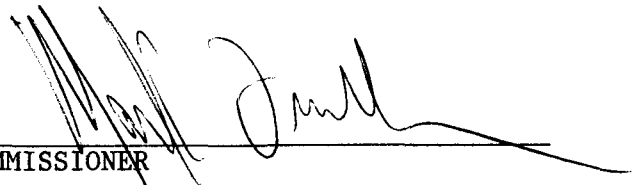
DATED: Albany, New York

STATE TAX COMMISSION

JAN 24 1983


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER